Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1994

JACQUELYNE L. NEAL,

Petitioner,

v.

WILLIAM H. BROWN, III, et al., partners practicing law under the firm name of Schnader, Harrison, Segal & Lewis

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JACQUELYNE L. NEAL
Pro Se
P. O. Box 750474
Memphis, Tennessee 38175
(901) 754-2392

80

QUESTIONS PRESENTED

1. Whether the Supreme Court should preserve state sovereignty and reinforce proper judicial administration in the federal courts by vacating the Third Circuit's Judgment Order and remanding this removed state action to the Superior Court of the District of Columbia for want of jurisdiction and appropriate relief, where the action was removed by Respondents (who are all licensed attorneys) in violation of 28 U.S.C. §1441(b) after Respondents had improperly filed their compulsory counterclaim in the Eastern District of Pennsylvania in violation of the Rule 13(a) bar, and where 28 U.S.C. §1447(c) and §1447(e) required the lower courts to remand this action to the Superior Court?

2. Whether the Supreme Court should exercise supervisory oversight of this removed state action to ensure proper judicial administration by vacating the Third Circuit's Judgment Order and remanding this action to the Superior Court of the District of Columbia for want of jurisdiction and appropriate relief, where Respondents removed this state action in violation of 28 U.S.C. §1441(b), after having improperly filed their compulsory counterclaim in the Eastern District of Pennsylvania in violation of the Rule 13(a) bar, and where judgment was entered in Respondents' favor in violation of Rules 8(a), 12(b) and 56(c) of the Federal Rules of Civil Procedure?

LIST OF ALL PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the courts below were the petitioner, Jacquelyne L. Neal, and the following defendants below and Respondents to this petition:

WILLIAM H. BROWN, III, ARTHUR H. KAHN, EDWARD W. MULLINIX, FRANK H. ABBOTT, MILTON D. ANDREWS, MASON AVRIGIAN, LAURANCE E. BACCINI, WILLIAM M. BARNES, DAVID G. BATTIS, EDWARD L. BAXTER, RICHARD D. BIRNS, STEPHEN D. BROWN, CHARLES R. BRUTON, M. CHRISTINE CARTY, S. JAY COOKE, J. GORDON COONEY, JAMES D. CRAWFORD, JOSEPH C. CRAWFORD, JOHN J. CUNNINGHAM, III, PAUL G. DEMBLING, DIANA S. DONALDSON, J. ALLEN DOUGHERTY, JAMES A. DROBILE, ISAAC E. DRUKER, JOSEPH B. ERWIN, PETER FEUERLE, ALMA S. FLESCH, W. MICHAEL GARNER, ALLAN D. GOODRIDGE, CARL J. GREEN, PETER S. GREENBERG, STEPHEN J. GREENBERG, THOMAS A. GREENE, VINCENT P. HALEY, JACOB P. HART, BANCROFT D. HAVILAND, RONALD E. HAYDANEK, CHARLES C. HILEMAN, III, CHARLES M. HONART, DAVID S. HOPE, JEFFREY R. HOROWITZ, JOHN H. HOUGH, JOHN D. ISKRANT, M. RICHARD KALTER, STEVEN R. KANES, JOHN T. KEHNER, ROBERT L. KENDALL, JR., ALAN H. KENT, DAVID E. KENTY, BRENDA C. KINNEY, WILBUR L. KIPNES, PHILIP G. KIRCHER, MARILYN Z. KUTLER, JOHN P. LAMPI, LARRY P. LAUBACH, JOHN H. LEDDY, NICHOLAS J. LePORE, III, SAUL LEVIT, JOSEPH LEVY, ALAN M. LIEBERMAN, MICHAEL J. MANGAN, JOHN E. McKEEVER, THOMAS J. McLEAN, HERBERT S. MEDNICK, ALBERT MOMJIAN, BARRY S. NEUMAN, GEORGE H. NOFER, ROBERT P. OBERLY, THOMAS EARL PATTON, RICHARD A. PENNA, DAVID S. PETKUN, NICHOLAS N. PRICE, YVES P. QUINTIN, GEORGE E. RAHN, JR., DONALD H. RIVKIN, SANFORD M. ROSENBLOOM, BRUCE A. ROSENFIELD, FRANK C. SABATINO, THOMAS R. SCHMUHL, DEENA JO

SCHNEIDER, LAURENCE SCHOR, JEFFREY L. SCHULTE, DONALD M. SCHWENTKER, IRVING R. SEGAL, JEROME J. SHESTACK, BARRY SIMON, DAVID SMITH, DELBERT D. SMITH, BERNARD J. SMOLENS, RALPH S. SNYDER, CARL A. SOLANO, BARRY R. SPIEGEL, GERARD J. ST. JOHN, CLINTON A. STUNTEBECK, DENNIS R. SUPLEE, SHERRY A. SWIRSKY, JOSEPH A. TATE, IRA P. TIGER, MARTIN WALD, RALPH G. WELLINGTON, MARGARET S. WOODRUFF, JOHN M. WYSER-PRATTE, (partners practicing law under the firm name of Schnader, Harrison, Segal & Lewis), BERNARD G. SEGAL (former senior partner — presently counsel for the firm), LOUIS K. MOFFA, JR. (former associate of the firm).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jacquelyne L. Neal, respectfully prays that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit, entered in the above styled proceeding on November 30, 1994.

OPINIONS BELOW

The following rulings have been reprinted and appear in the Appendix: November 30, 1994 Judgment Order from the Third Circuit, 1-3a; March 6, 1991 Memorandum and Order from the U. S. District Court ("USDC") District of Columbia, 4-6a; March 26, 1991 Memorandum and Order from the USDC Eastern District of Pennsylvania, 7-12a; November 19, 1991 Memorandum and Order from the USDC District of Columbia, 13-15a; November 20, 1991 Memorandum and Order from the USDC District of Columbia, 16-27a; December 11, 1992 Per Curiam Opinion from the U. S. Court of Appeals for the D. C. Circuit, 28-31a and reported at 980 F.2d 747 (D.C. Cir. 1992); July 20, 1993 Memorandum and Order from the USDC District of Columbia, 32-33a; October 13, 1993 Order from the U. S. Court of Appeals for the D. C. Circuit, 34a; December 2, 1993 Memorandum and Order from the USDC Eastern District of Pennsylvania, 35-36a; March 22, 1994 Memorandum and Order from the USDC Eastern District of Pennsylvania, 37-39a; June 14, 1994 Order from the USDC Eastern District of Pennsylvania, 40a; January 4, 1995 order from the Third Circuit, 41-43a; May 17, 1994 Memorandum and Order, 44-48a, infra.

JURISDICTION

A timely appeal was taken by Petitioner on June 15, 1994, under 28 U.S.C. §1291, from the District Court's May 17, 1994 Memorandum and Order, entering judgment in favor of Respondents, and simultaneously, appeal was taken by Petitioner from the foregoing Memoranda and Orders appearing in the Appendix on pp. 4-6a; 16-27a; 32-33a; 35-36a; and 37-39a, infra.

The Judgment Order of the Third Circuit was entered on November 30, 1994, and a timely petition for rehearing was filed by Petitioner on December 13, 1994. On January 4, 1995 the Third Circuit entered an order denying rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This case involves inter alia, fraud having been committed by licensed attorneys in formulating their charges for legal services while milking monies from Petitioner and from the U. S. Treasury. [Exhibit D-35 annexed to Petitioner's November 22, 1993 Deposition; U. S. Treasury Check No. 3007 55203527, 1-24A][1]

Petitioner, a resident of Memphis, Tennessee and a former investigator with the Equal Employment Opportunity Commission (EEOC), retained Respondents (more than 100 partners practicing law under the firm name of Schnader, Harrison, Segal & Lewis) for an administrative appeal proceeding before the Merit Systems Protection Board (MSPB), in her case against EEOC involving on-the-job sexual harassment and retaliatory termination. [2-4A]

Petitioner won her case against the EEOC. [2-4A] MSPB ordered her reinstatement with full backpay, as well as awarded Petitioner $56,134.95 as reasonable attorneys' fees and expenses, which was paid directly to Respondents by EEOC. [4A; U. S. Treasury Check No. 3007 55203527] Prior to the award, Petitioner had already paid out $30,285.74 in legal fees and expenses, and the combined monies paid out by Petitioner and EEOC total $86,420.69. [4-5A] Nonetheless, Respondents only refunded Petitioner a meager $13,401.47 and unlawfully retained the $16,884.27 balance of her refund payment. [4-5A]

Respondents' time records submitted to MSPB in support of their request for attorneys' fees do not comport with the time records which Respondents submitted to Petitioner with her balloon final bill. [5-6A; Exhibit D-35 annexed to Petitioner's November 22, 1993 Deposition]

Petitioner fell victim to fraud by Respondents, who, inter alia, claimed charges for work which was not performed; represented a lower expenditure of time in their request for attorneys' fees submitted to MSPB, and subsequently reflected a higher expenditure of time in the time records accompanying Petitioner's balloon final

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1. Materials not included in the Appendix annexed hereto, but which appeared in the Appendix filed in the Court of Appeals shall be referred to as ["____ A"], or by identifying the document if not included herein.

bill, for corresponding work on the corresponding dates. [4-6A; Exhibit D-35 annexed to Petitioner's November 22, 1993 Deposition]

At Respondents' request, Petitioner submitted a 47-page letter of complaint on January 4, 1988, therein delineating, inter alia, numerous inconsistencies between the time records submitted to MSPB and the time records submitted by Respondents with Petitioner's final bill. [5A; Exhibit D-35 annexed to Petitioner's November 22, 1993 Deposition] In lieu of releasing Petitioner's additional $16,884.27 refund payment, on March 9, 1988, Respondents offered to pay Petitioner $1,500.00, which she summarily rejected. [5A; 348A]

After Respondents repeatedly deceived Petitioner into believing that they would release the balance of her refund payment, Petitioner commenced street demonstrations outside of Respondents' Philadelphia office, and District of Columbia office, where the fraudulent charges were formulated. [news articles, front page, The Philadelphia Tribune, February 6, 1990 issue; front page, The Philadelphia Tribune, February 16, 1990 issue; front page, The Legal Intelligencer, April 4, 1990 issue; pp. 8-9, Washington City Paper, September 21, 1990 issue; [5-9A] During the on-going demonstrations in Philadelphia, Respondents offered to pay Petitioner $3,100.00, which she summarily rejected. [11A]

Petitioner's claims of fraud having been committed by these licensed attorneys were viewed in the legal community as a hands-off case; therefore, Petitioner proceeded with legal action appearing pro se, and filed a multi-million dollar lawsuit in the Superior Court of the District of Columbia on October 5, 1990, requesting a jury trial. [1-22A] Petitioner's 4-Count Complaint includes breach of contract, deceit, fraud and willful infliction of emotional distress. [1-22A]

In turn, one hundred two (102) Respondents filed their compulsory counterclaim in the U.S. District Court for the Eastern District of Pennsylvania on October 15, 1990, under the guise of filing a declaratory judgment action against Petitioner, which raised the same issues already raised in Petitioner's Superior Court Complaint, and within their own action, Respondents conceded that monies are owed to Petitioner. [1-45A]. Respondents then improvidently removed Petitioner's Complaint from the Superior Court to the U. S. District Court

for the District of Columbia on October 26, 1990, in violation of 28 U.S.C. §1441(b). [46-87A]

Three (3) Respondents who joined in the compulsory counterclaim were District of Columbia citizens at the time this action was removed; therefore, the provisions of 28 U.S.C. §1441(b) barred the removal of Petitioner's action. [1-87A]

Petitioner's efforts to amass the identification of the voluminous Respondents prior to filing her Complaint, were unsuccessful. [125-127A] By virtue of the District of Columbia's Uniform Partnership Act, §41-108 of the D.C. Code, all Respondents who could not be identified by Petitioner at the time of filing, were joined in the October 5, 1990 civil action, including the District of Columbia citizens. [128A]

After the identification of the voluminous Respondents was revealed to Petitioner, via Respondents' compulsory counterclaim, and after the District of Columbia District Court granted Respondents an extension until November 16, 1990 to answer the Complaint, Petitioner exercised her rights under Rule 15(a), by filing an Amended Complaint on November 8, 1990, reflecting therein the names of all 100 plus Respondents, including the three (3) District of Columbia citizens. [94-119A]

Petitioner timely filed a motion to remand on November 13, 1990, pursuant to 28 U.S.C. §1447(c), alerting the court of the defect in removal. [120-148A] On March 6, 1991, the court denied Petitioner's motion to remand, and made no mention of the District of Columbia citizens within its ruling. [4-6a][2]

Based upon the defect in removal, the provisions of 28 U.S.C. §1447(c) required the court to remand Petitioner's action for lack of subject matter jurisdiction over the action. [23-45A; 120-140A]

Petitioner's Amended Complaint stripped the federal court of any possibly misconceived subject matter jurisdiction, and since the amendment was filed as-of-right, the District Court had no option, under 28 U.S.C. §1447(e), but to accept the amendment and remand the action. [120-148A; 4-6a]

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2. Materials appearing in the Appendix to this petition will be referred to as ["____ a"].

In the wake of the March 6, 1991 ruling, the Chief Judge in the Eastern District of Pennsylvania, on March 26, 1991, granted Petitioner's motion to dismiss Respondents' Pennsylvania action. [7-12a] The Chief Judge ruled that Respondents' Pennsylvania claim was a compulsory counterclaim in the Superior Court before the action was removed. [10a]

After Petitioner filed a 22-page Affidavit Requesting Disqualification of the District of Columbia Presiding Judge for Personal Bias and Prejudice, on March 29, 1991, together with the required Certification of Good Faith, the Judge continued presiding over Petitioner's action, notwithstanding the provisions of 28 U.S.C. §144, which stipulate that the presiding judge was "to proceed no further therein . . . ." [303-327A]

Petitioner's Affidavit and other pleadings simultaneously filed on March 29, 1991, were never entered into the District Court's Docket. [419-420A] The Presiding Judge ruled on the undocketed Affidavit on November 19, 1991, and on September 30, 1992, judicial support personnel found the undocketed Affidavit in the Presiding Judge's Chambers. [419-420A; 13-15a] On the same date that the Presiding Judge ruled on Petitioner's Affidavit, the Presiding Judge dismissed Petitioner's claims for breach of contract and willful infliction of emotional distress. [16-27a]

Thereafter, the District of Columbia District Court pitched Petitioner's remaining claims of fraud and deceit to the Eastern District of Pennsylvania, reflecting in its ruling that the transfer was pursuant to 28 U.S.C. §1404(a). [32-33a]

The Court of Appeals for the D. C. Circuit, denied Petitioner's petition for a writ of mandamus to block the improper transfer of her action. [34a]

The Pennsylvania court, in turn, denied Petitioner's 37-page motion to have the court review the facts of her improvidently removed state action. [35-36a] The Pennsylvania court never claimed in any of its rulings that it had subject matter jurisdiction over Petitioner's action; nonetheless, the District Court entered judgment in Respondents' favor on May 17, 1994, after having already denied Respondents' motion for summary judgment on March 22, 1994, based upon the

same information already in the court's possession, which the court subsequently used for its basis for entering judgment. [37-38a, 44-48a]

The District Court's May 17, 1994 order of judgment does not reflect the court's basis for entering judgment; nonetheless, the District Court denied Petitioner's motion for reconsideration and her motion for clarification. [40a]

In dismissing Petitioner's claims, both District Courts ignored its lack of subject matter jurisdiction over Petitioner's action; ignored the record; and failed to apply the provisions of Rules 8(a), 12(b), and 56(c) of the Federal Rules of Civil Procedure (F.R.C.P.), and 28 U.S.C. §1447(c) and (e). [1-704A; 16-27a, 44-48a]

This case has been entrapped behind the doors of the District Courts since October 26, 1990, without a trial or hearing, and the U. S. Court of Appeals for the D. C. Circuit, as well as the Third Circuit, shirked its supervisory duty to cure the defect in subject matter jurisdiction in Petitioner's action, by having failed to order remand of her action to the District of Columbia Superior Court. [1-3a; 28-31a; 34a; 41-43a]

Petitioner raised the defect in subject matter jurisdiction in her March 29, 1991 appeal taken from the March 6, 1991 ruling denying remand, and simultaneously denying injunctive relief. [4-6a; 13-15a] Petitioner's appeal was taken as-of-right, pursuant to 28 U.S.C. §1292(a)(1), which allows for appeals to be taken from interlocutory orders denying injunctive relief. [4-6a] The D. C. Circuit redirected Petitioner's appeal to an unrelated statute, 28 U.S.C. §1291, and dismissed the appeal for lack of jurisdiction to review the appeal under §1291. [28-31a]

The Third Circuit also disregarded the defect in subject matter jurisdiction, and affirmed the District Court's May 17, 1994 judgment on November 30, 1994. [1-3a] The Third Circuit, in concert, denied the petition for rehearing on January 4, 1995. [41-43a]

The March 26, 1991 ruling by the Chief Judge was ignored by Respondents as well as the courts. [295-704A; 1-3a; 7-48a] Respondents were allowed to override the Rule 13(a) bar of the F.R.C.P. [1-704A; 1-48a]

REASONS FOR GRANTING THE WRIT

I

THIS CASE COMMANDS EXTRAORDINARY RELIEF FROM THE SUPREME COURT IN THE WAKE OF NINETEEN CIRCUIT COURT JUDGES DECLINING TO RISE TO THEIR STATUTORY OBLIGATION TO REMAND THIS REMOVED STATE ACTION FOR WANT OF JURISDICTION

Subject matter jurisdiction is the heartbeat of any case which is brought into the courts for adjudication. The manner in which this case was held as a hostage in the federal courts since 1990, without the courts having subject matter jurisdiction, should be viewed by the Supreme Court as an outright disgrace.

Licensed attorneys who commit fraud in formulating their charges for legal services are not above the law, and it is outrageous that nineteen (19) Circuit Court Judges refused to rise to their statutory obligation and cure the subject matter jurisdictional defect in this case involving licensed attorneys.

Every court throughout this nation has a responsibility to safeguard statutory provisions and adhere to such provisions, irrespective of the status of the litigants. Although Petitioner is appearing individually as plaintiff in this civil action, Petitioner represents the masses of citizens (young and elderly, poor and wealthy) throughout this nation who utilize the legal services of attorneys.

The Supreme Court cannot afford to sit idle and allow licensed attorneys who appear as litigants to overpower the courts, nor allow the rights of citizens to adjudicate claims against licensed attorneys to undergo forfeiture because they are not officers of the court.

The Supreme Court has long recognized the supervisory power of appellate courts over the district courts to ensure "proper judicial administration in the federal courts." LaBuy v. Howes Leather Co., 352 U.S. 249, 259-60 (1957).

The lower courts did not adhere to the principles outlined in

LaBuy, supra, in failing to remand Petitioner's action to the Superior Court to ensure "proper judicial administration."

The D. C. Circuit turned its back on its own holding in Colonial Times, Inc. v. Gasch, 509 F.2d 517, 523 (D.C. Cir. 1975), in failing to remand Petitioner's action and denying Petitioner's petition for a writ of mandamus to block the improper transfer of her action to the Eastern District of Pennsylvania.

In Colonial Times, supra, the court granted a writ of mandamus to correct the district court's erroneous view of Rule 30, F.R.C.P., stating therein: "some egregious errors by the trial court may so misdirect the trial that a failure to immediately correct [them] will force the parties through a useless trial, only to be ordered to a retrial after appellate reversal of the final judgment." Accord: In Re Furlong, 885 F.2d 815 (11th Cir. 1989)

In the instant case, no effort was made to correct the egregious errors made by the District Court; rather, the D. C. Circuit reflected distorted information within its December 11, 1992 Per Curiam Opinion, as opposed to exposing the egregious errors made by the District Court in denying remand of Petitioner's action. Neal v. Brown, et al., 980 F.2d 747 (D.C. Cir. 1992)

The D. C. Circuit failed to reveal in its Per Curiam Opinion that Petitioner was denied injunctive relief, and the appeal, therefore, was properly taken, as-of-right, pursuant to 28 U.S.C. §1292(a)(1). Neal, supra. Petitioner was not searching for a review platform, as was erroneously depicted in the Per Curiam Opinion. Neal, supra.

Case law should mirror accurate information; however, in Petitioner's case, the D. C. Circuit disseminated case law which mirrors distorted information, in lieu of correcting the egregious errors made by the District Court in denying remand of Petitioner's action. Neal, supra.

Logic dictates that if the federal court has subject matter jurisdiction over Petitioner's action, the D. C. Circuit would have come forth, without hesitation, and made this definitive statement, as opposed to dodging the issue by reflecting distortions within its Per Curiam Opinion. Neal, supra.

Every citizen in this nation is entitled to a fair and impartial tribunal, and the Supreme Court cannot afford to endorse the actions of the lower court in rendering its Per Curiam Opinion.

The D. C. Circuit denied Petitioner her right to take an appeal from the District Court's consolidated ruling, which clearly contained the denial of injunctive relief and denial of remand. The D. C. Circuit aborted the provisions of 28 U.S.C. §1292(a) (1) in dismissing Petitioner's appeal for lack of jurisdiction.

Congress did not enact statutes for a select group of individuals. The provisions of the statutes apply to all litigants; however, in the instant case, which involves claims of fraud having been committed by licensed attorneys, no statutory provision was applied to Petitioner's action.

The D. C. Circuit ignored the District Court's failure to remand this action to the Superior Court, pursuant to the statutory provisions enunciated in 28 U.S.C. §1447(c), and §1447(e). Inasmuch as Respondents removed the action in violation of 28 U.S.C. §1441(b), and Petitioner had timely filed an Amended Complaint, as-of-right, pursuant to Rule 15(a) F.R.C.P., both statutes left the District Court with no option but to remand the action.

The D. C. Circuit also ignored the District Court's improper transfer of this action to the Eastern District of Pennsylvania under 28 U.S.C. §1404(a). Based upon the defect in removal, the District Court lacked subject matter jurisdiction over Petitioner's action, and in the absence of having subject matter jurisdiction, the District Court lacked jurisdictional power to enter its transfer order.

As far back as 1950, the foregoing principle was enunciated in Scarmardo v. Mooring, 89 F. Supp. 926, 937 (D.C. S.D. Tex. 1950), wherein the court remanded the action for lack of subject matter jurisdiction. The court declined to transfer the action, stating: "[s]ince this court has not acquired jurisdiction of the case it may not . . . transfer it . . ." Having found that the removal was improperly filed, the court further held; "[t]his court being without jurisdiction has no power to so transfer the case." Scarmardo, supra at 937.

Courts have adhered to the principle enunciated in Scarmardo,

as evidenced in the District of Columbia Circuit in Rice v. Disabled American Veterans, 295 F. Supp. 131 (D.D.C. (1968)), wherein the court held that since it was without proper authority over the action, it could not transfer the action to any other district. Nonetheless, Petitioner's action was pitched from the D. C. Circuit to the Eastern District of Pennsylvania, in the Third Circuit.

The Supreme Court has stated, without qualification, that improper transfer under 28 U.S.C. §1404(a) is a matter of subject matter jurisdiction. Hoffman v. Blaski, 363 U.S. 335, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960)

The Supreme Court re-emphasized the foregoing principle in American Oil Co. v. McMullin, 483 F.2d 1091, 1095 (10th Cir. 1970) 363 U.S. 335, 343, 80 S. Ct. 1084, 1089, wherein the Court held that the transferee court lacked jurisdiction, and stated: "[t]he transferee courts could have acquired jurisdiction over these actions only if properly brought in those courts, or validly transferred thereto under §1404(a) . . . ." [Emphasis added]

In the instant case both circuits ignored the irrefutable facts that this action was commenced in a state court under a local jurisdiction; improperly removed by Respondents to the federal court in violation of 28 U.S.C. §1441(b); and invalidly transferred, on Respondents' motion, under 28 U.S.C. §1404(a). Moreover, both circuits ignored the Supreme Court's ruling in Gulf Oil Corp. v. Gilbert, 330 U.S. 502, 508 (1947), which specifically holds that the plaintiff's choice of forum shall rarely be disturbed.

Petitioner's Affidavit Requesting Disqualification of the Presiding Judge in the District of Columbia for Personal Bias and Prejudice was completely ignored by both circuits, notwithstanding the fact that the provisions of 28 U.S.C. §144, clearly stipulate that the presiding judge "shall proceed no further therein . . . ."

The wholesale disregard of statutory provisions in this case which involves fraud having been committed by licensed attorneys, cannot be sanctioned by the Supreme Court of the United States.

The Chief Judge in the Eastern District of Pennsylvania was able to rise to his statutory mandate to accord all litigants a fair and impartial tribunal, when he dismised all claims filed by these licensed

attorneys in violation of the Rule 13(a) F.R.C.P. bar. The ruling (rendered on the heels of the District of Columbia Court having denied Petitioner injunctive relief from the Pennsylvania action and simultaneously denied remand of her removed state action) turned the spotlight upon the District of Columbia District Court.

The Chief Judge distinguished himself in this case, and did not allow the status of the litigants nor the claims involved in this case to color his statutory obligation to ensure "proper judicial administration," as enunciated in LaBuy, supra.

The Supreme Court, in turn, must rise to its statutory obligation to ensure proper judicial administration, by remanding this action to the District of Columbia Superior Court.

The Supreme Court cannot allow the Third Circuit or the D. C. Circuit to overthrow proper judicial administration, in deference to fellow members-of-the-bar, who appear as defendants. This case presents a real danger to the American people. Petitioner, understandably, is not the only individual in this nation who utilizes the legal services of attorneys and all citizens are entitled to a fair and impartial tribunal when they are forced to haul their attorneys into court.

Petitioner could not find one court to come forth and cure the defect in subject matter jurisdiction by remanding this action to the Superior Court.

In Hoffman, supra, the Supreme Court declared that jurisdictional questions can be raised at any time; however, the Third Circuit and the D. C. Circuit did not adhere to the principles enunciated in Hoffman, by having failed to cure the jurisdictional defect in this action.

The Third Circuit, heretofore, had adhered to the principle first enunciated by the Supreme Court in Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941), that removal statutes are to be strictly construed against removal jurisdiction. The Third Circuit added to this principle by stating that "all doubts should be resolved in favor of remand." Abels v. State Farm & Casualty Co., 770 F.2d 26 (3rd Cir. 1985)

The District Court in Philadelphia, Pennsylvania (where the Third Circuit sits and where Respondents' principal office is located)

ignored the defect in subject matter jurisdiction, after Petitioner's action was improperly transferred. In having failed to cure the defect, the District Court strayed from the holdings in Hoffman and in Shamrock Oil, as well as made a grave departure from the Third Circuit's own holding in Abels, supra.

In Steel Valley Authority v. Union Switch & Signal Division, 809 F.2d 1006, 1010 (3rd Cir. 1987), the Third Circuit stated: "[i]t remains the defendant's burden to show the existence and continuance of federal jurisdiction [citing Abels, supra] . . .; and [t]hat burden continues through judgment if not beyond . . ." [Citations omitted]

The Third Circuit, nonetheless, ignored Respondents' failure to make a remote showing of federal jurisdiction over this removed state action.

The Supreme Court declared in Hoffman, supra, that jurisdiction must be reexamined by the transferee court. The Third Circuit, as well as the District Court, had the authority and the obligation to examine the facts of this case, and to cure the jurisdictional defect.

In Heintz & Co. v. Provident Trademens Bank and Trust Co., 228 F. Supp. 165, 168 (E.D. Pa. 1964), the court remanded the case pursuant to §1447(c) for lack of subject matter jurisdiction, stating: "[j]urisdiction is lacking in the sense that this action has been removed to this court contrary to the plain terms of the statute [§1441(b)] . . . It is difficult to conceive that Congress envisioned final judgment in any action in which the court lacked jurisdiction over the subject matter." Accord: A. E. Stanley Manufacturing Co. v. Fishback & Moore, Inc., 353 F. Supp. 578 (E.D. Pa. 1973); Glenmede Trust Company v. Dow Chemical Company, 384 F. Supp. 423 (E.D. Pa. 1974).

The District Courts in the Third Circuit and the D. C. Circuit never addressed the provisions of 28 U.S.C. §1441(b), §1447(c), §1447(e), Rule 15(a) F.R.C.P., or §41-108(a) D.C. Code, Uniform Partnership Act, in denying remand of this action.

In Steel Valley, supra, the Third Circuit stated: "[t]he lack of subject matter jurisdiction voids any decree entered in a federal court and the continuation of litigation in a federal court without jurisdiction would be futile."

Unlike the foregoing principle enunciated in Steel, supra, Petitioner's multi-million dollar lawsuit against these licensed attorneys was kept-under-cover, behind the doors of the federal courts since 1990, with the courts clearly lacking subject matter jurisdiction, and without a trial or hearing. Petitioner's claims of fraud against these licensed attorneys brought forth judicial economic waste.

The Supreme Court cannot allow licensed attorneys to use the courts as a haven, at the expense of taxpayers, nor can the Supreme Court close its eyes to this kind of economic waste having been sanctioned by the Third Circuit and the D. C. Circuit.

Taxpayers should not be burdened with unnecessary economic waste. Respondents had already milked monies from Petitioner and the U. S. Treasury. Ironically, the Third Circuit and the D. C. Circuit allowed Respondents to milk more monies from taxpayers in their endeavor to use the federal courts as an escape avenue.

In the face of having sanctioned the economic waste, none of the Circuit Court Judges (out of nineteen) ever stated that the federal court has subject matter jurisdiction over this action.

The Third Circuit's holding in Steel Valley, supra, obviously does not apply to cases involving fraud having been committed by fellow members-of-the-bar.

Licensed attorneys are found everywhere throughout this nation and the Supreme Court cannot allow the Third Circuit and the D. C. Circuit to make new laws and statutory provisions for licensed attorneys.

In wide contrast to the holdings in Heintz, supra, the District Court in Pennsylvania, proceeded with entering judgment in favor of all Respondents, irrespective of the court clearly lacking subject matter jurisdiction over Petitioner's action. The court, via its ruling, categorized Respondents as "a prominent and highly regarded group of attorneys," and declared that Respondents were "entitled to summary judgment." Noticeably, the court refrained from making any claim of having subject matter jurisdiction over the action; in fact, within its May 17, 1994 ruling, the court did not reveal where the action was commenced, and the ruling is totally silent of any

information relating to the removal and subsequent transfer of this action.

Nonetheless, the Third Circuit ignored the District Court's failure to establish subject matter jurisdiction, and proceeded with entering a 2-sentence Judgment Order, affirming the District Court's defective order, without having made a faint attempt to address the remand issue in its Judgment Order. In turn the Third Circuit, in concert, proceeded with entering a terse order denying Petitioner's petition for rehearing, without having made any attempt to address the defect in its order.

The Third Circuit's bold affirmance of the District Court's judgment, represents the high-water mark of the blatant disregard of statutory provisions in deference to Respondents.

The Supreme Court cannot afford to applaud fraud being committed by licensed attorneys, nor can the Supreme Court afford to sanction the Third Circuit's affirmance of a defective judgment. Petitioner has exhausted all other available courts and now this case commands extraordinary relief from the Supreme Court.

The defect in subject matter jurisdiction remains unchanged, and now the burden is upon the Supreme Court to rise to its statutory mandate, and cure the defect by remanding Petitioner's action to the District of Columbia Superior Court for want of jurisdiction.

Respondents' efforts to sabotage the adjudication of the fraud claims, by overriding the statutory provisions enacted by Congress, and pitching this state action into the federal courts, should bring forth outright indignation from the Supreme Court.

The Supreme Court cannot afford to deny certiorari and shirk its supervisory duty to cure the defect in subject matter jurisdiction. The Supreme Court cannot condone state actions being pitched at-will behind the doors of the federal courts.

II

THIS CASE COMMANDS SUPERVISORY OVERSIGHT BY THE SUPREME COURT TO ENSURE PROPER JUDICIAL ADMINISTRATION

The Supreme Court cannot allow licensed attorneys who appear as litigants to sabotage the adjudication of fraud claims because they are officers of the court. Licensed attorneys are no different than any other citizen, and claims of fraud having been committed by licensed attorneys should not by-pass proper judicial administration, in an effort to rescue these licensed attorneys.

The Supreme Court cannot allow federal courts to apply federal statutes and the Federal Rules of Civil Procedure based upon the status of the litigants, nor allow the federal courts to form a members-of-the-bar network to aid licensed attorneys who commit fraud in formulating their charges for legal services, and who are hauled into court by a citizen to have the claims properly adjudicated.

If citizens who haul their attorneys into court for having formulated fraudulent charges for legal services cannot be accorded the same protection under the Federal Rules of Civil Procedure and statutes enacted by Congress, as any other civil litigant, fraudulent charges by attorneys can become rampant in the legal community throughout this entire nation, leaving citizens, as well as giant corporations, totally defenseless.

In the wake of the Third Circuit having shirked its supervisory duty, the burden is now upon the Supreme Court to ensure that all litigants are accorded a fair and impartial tribunal. The Supreme Court cannot allow licensed attorneys to override the Federal Rules of Civil Procedure or statutes enacted by Congress, and waste monies from taxpayers by tying up the dockets of two (2) federal courts in their endeavor to manipulate the judicial system and block adjudication of fraud claims.

In lieu of adhering to proper judicial administration, the District of Columbia Circuit and the Third Circuit unshamefully allowed the licensed attorneys who are appearing as defendants in this action, to override the provisions of 28 U.S.C. §1441(b), upon removing this state action from the District of Columbia Superior Court.

Both circuits also allowed these licensed attorneys to override the Rule 13(a) bar of the F.R.C.P., by having totally disregarded their compulsory counterclaim, and further allowed Respondents to override the provisions of 12(b) and 56(c) F.R.C.P., by having dismiss-

ed Petitioner's claims, without having required these licensed attorneys to comply with the provisions of 12(b) and 56(c) F.R.C.P. In the same vein, both circuits ignored both District Courts having failed to adhere to 8(a), 12(b), and 56(c) F.R.C.P. in dismissing Petitioner's claims. The lower courts failed to adhere to "proper judicial administration" as was articulated in the Supreme Court's ruling in LaBuy, supra.

In lieu of allowing Petitioner's claims to proceed with proper judicial administration, by remanding her action to the District of Columbia Superior Court, the Third Circuit ignored the defect in subject matter jurisdiction, and further ignored the genuine issues of material facts which exist in this case, relating to the statute of limitations.

In Kropinski v. World Plan Executive Council, 853 F.2d 948 (D.C. Cir. 1988) the court specifically held that questions as to whether plaintiff discovered or should have discovered fraud, were questions for the jury, and accordingly, denied the defendants motion for summary judgment. The court further stated that "[i]n a fraud case, the statute of limitations will not begin running until the date the fraud is discovered or reasonably should have been." Kropinski, at 955.

In Hartford Life Insurance Company v. Title Guarantee Company, 520 F.2d 1170, 1174 (D.C. Cir. 1975) the court held that "[t]he statute of limitations for a cause of action based upon fraud or concealment does not begin to run until the date on which the defrauded party ascertains, or with the exercise of due diligence should ascertain the material facts upon which the claim is based."

The Third Circuit sanctioned the District Courts (including the District of Columbia District Court) having ignored case law and having allowed Respondents to declare the commencement date for the 3-year statute of limitation on Petitioner's fraud claim and breach of contract claim.

The Supreme Court cannot allow licensed attorneys to assume the duty of a jury, nor allow licensed attorneys to simultaneously assume a dual role as defendant and plaintiff.

The Third Circuit sanctioned the District Court throwing out Petitioner's fraud claims, based upon opposing counsel's bare argument

that Petitioner cannot establish that Respondents' statements were false when uttered.

The Third Circuit, in Sorba v. Pennsylvania Drilling Company, Inc., 821 F.2d 200 (3rd Cir. 1987) reversed the summary judgment entered by the lower court, stating, at pg. 203, "[w]hen ruling on a motion for summary judgment, the judge's role is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial . . ." (Citations omitted)

The Third Circuit ignored case law, as well as ignored the record, which shows that out of more than one hundred Respondents, there was not one affidavit filed with the court, denying Petitioner's claim of fraud.

The Supreme Court cannot allow licensed attorneys to undermine the judicial system, and formulate their own tribunal. Licensed attorneys cannot be allowed to act as the trier of facts.

The Third Circuit disregarded the excerpts from the videotaped deposition of Respondents' own witness, whose testimony verified that Respondents claimed charges for work which was not performed.

The Third Circuit also disregarded the District Court having reflected erroneous information in its May 17, 1994 ruling, to support its entry of judgment in favor of Respondents, e.g., the District Court claimed that Petitioner had no contact "whatsoever" with Respondent Moffa after July 20, 1987, while Respondents' own exhibit marked as D-87, and annexed to Petitioner's November 22, 1993 deposition, shows that Petitioner had contact with Respondent Moffa as late as August 1990.

The entire record in this case was transmitted by the District Court, pursuant to the Third Circuit's Local Appellate Rule 11.2, which requires the transmission of the entire record in all pro se cases. Therefore, the Third Circuit was privy to all pertinent information relating to this case.

The Third Circuit disregarded the District Court having initially denied Respondents' motion for summary judgment, based upon Respondents' failure to submit Petitioner's deposition, and having subsequently entered judgment in favor of Respondents, after the

submission of Petitioner's deposition, without making any reference to Petitioner's deposition testimony to support its subsequent ruling.

The hide-and-seek technique used by the District Court in entering judgment in favor of these licensed attorneys, would cause eyebrows to be raised, even among non-legal persons.

The Third Circuit totally ignored the District Court's failure to establish subject matter jurisdiction over Petitioner's action, as well as ignored the District Court having failed to reflect in its May 17, 1994 ruling that Respondents were entitled to summary judgment as a matter of law.

The Third Circuit, via its Judgment Order of affirmance, endorsed the District Court's defective Order, which accompanied the May 17, 1994 Memorandum. The Order is totally silent of any basis for having entered judgment, and it does not, at all, reference the May 17, 1994 Memorandum. Moreover, the Order does not identify the defendants in whose favor the judgment was entered, nor does it identify the party against whom the judgment was entered. Conspicuously, the Third Circuit ignored the District Court having DENIED Petitioner's motion for clarification.

The District Court's open-ended, cloak-and-dagger order of judgment is, to say the least, far removed from proper judicial administration, and the Supreme Court cannot allow licensed attorneys to wipe out the integrity of the judicial system.

Licensed attorneys who commit fraud in formulating their charges for legal services while milking monies from an American citizen and from the U. S. Treasury, should not be protected behind the doors of the federal courts.

The American people cannot be expected to cower down to any and all charges meted out by attorneys, and citizens who haul attorneys into court for formulating fraudulent charges for legal services are entitled to maintain their own dignity as the plaintiff in the action, and be accorded a fair and impartial tribunal as any other civil litigant.

The Supreme Court cannot afford to deny certiorari. Licensed attorneys cannot be held above the law, or receive a standing ovation for formulating fraudulent charges for legal services.

CONCLUSION

The Supreme Court commands the highest respect throughout this entire nation, and the Supreme Court cannot allow the American people or the U. S. Treasury to become enslaved to fraudulent charges claimed by licensed attorneys.

The good old boys network has no place in the judicial system. The Supreme Court cannot allow licensed attorneys to bring disrepute upon the judiciary, as well as cause unnecessary economic waste at the expense of taxpayers.

This improvidently removed state action has now made its way all the way up to the highest court in the nation, and now the burden is upon the Supreme Court to rise to its statutory supervisory obligation to ensure proper judicial administration.

As relief, Petitioner seeks an ORDER from the Supreme Court VACATING the Third Circuit's November 30, 1994 Judgment Order, as well as VACATING all of the remaining adverse orders entered by the District Courts in the Eastern District of Pennsylvania and in the District of Columbia.

As further relief, Petitioner seeks an ORDER from the Supreme Court remanding Petitioner's action directly back to the Superior Court of the District of Columbia, for want of jurisdiction, with a further ORDER instructing the Superior Court to ENTER DEFAULT JUDGMENT for the TOTAL AWARD sought by Petitioner for compensatory and punitive damages in her 4-count Superior Court Complaint, against ALL RESPONDENTS named in Petitioner's Amended Complaint, with an additional award of all costs incurred by Petitioner as a result of the improvident removal.

For the various reasons outlined herein, the Supreme Court should GRANT this Petition for Writ of Certiorari.

Respectfully submitted,

JACQUELYNE L. NEAL
Petitioner, Pro Se
P.O. Box 750474
Memphis, Tennessee 38175
(901) 754-2392

March 30, 1995

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1645

JACQUELYNE L. NEAL,

Appellant

v.

SCHNADER, HARRISON, SEGAL & LEWIS; WILLIAM H. BROWN, III; BERNARD G. SEGAL; ARTHUR H. KAHN; EDWARD MULLINIX; LOUIS R. MOFFA, JR.; FRANK H. ABBOTT; MILTON D. ANDREWS; MASON AVRIGIAN; LAURANCE E. BACCINI*; WILLIAM M. BARNES; DAVID G. BATTIS; EDWARD L. BAXTER; RICHARD D. BIRNS; STEPHEN D. BROWN; CHARLES R. BRUTON; M. CHRISTINE CARTY; S. JAY COOKE; J. GORDON COONEY; JAMES D. CRAWFORD; JOSEPH C. CRAWFORD; JOHN J. CUNNINGHAM, III; PAUL G. DEMBLING; DIANA S. DONALDSON; J. ALLEN DOUGHERTY; JAMES A. DROBILE; ISAAC E. DRUKER; JOSEPH B. ERWIN; PETER FEUERLE; ALMA S. FLESCH; W. MICHAEL GARNER; ALLAN D. GOODRIDGE; CARL J. GREEN; STEPHEN J. GREENBERG; THOMAS A. GREENE; VINCENT P. HALEY; JACOB P. HART; BANCROFT D. HAVILAND; RONALD E. HAYDANEK; CHARLES C. HILEMAN, III; CHARLES M. HONART; DAVID S. HOPE; JEFFREY R. HOROWITZ; JOHN H. HOUGH; JOHN D. ISKRANT; M. RICHARD KALTER; STEVEN R. KANES; JOHN T. KEHNER; ROBERT L. KENDALL, JR.; ALAN H. KENT; DAVID E. KENTY; BRENDA C. KINNEY; WILBUR L. KIPNES; PHILIP G. KIRCHER; MARILYN Z. KULTER; JOHN P. LAMPI;

* (Amended as per the Clerk's 7/29/94 Order)

LARRY P. LAUBACH; JOHN H. LEDDY; NICHOLAS J. LEPORE, III; SAUL LEVIT; JOSEPH LEVY; ALAN M. LIEBERMAN; MICHAEL J. MANGAN; JOHN E. McKEEVER; THOMAS J. McLEAN; HERBERT S. MEDNICK; ALBERT MOMJIAN; BARRY S. NEUMAN; GEORGE H. NOFER; ROBERT P. OBERLY; THOMAS EARL PATTON; RICHARD A. PENNA; DAVID S. PETKUN; NICHOLAS N. PRICE; YVES P. QUINTIN; GEORGE E. RAHN, JR.; DONALD H. RIVKIN; SANFORD M. ROSENBLOOM; BRUCE A. ROSENFIELD; FRANK C. SABATINO; THOMAS R. SCHMUHL; DEENA JO SCHNEIDER; LAURENCE SCHOR; JEFFREY L. SCHULTE; DONALD M. SCHWENTKER; IRVING R. SEGAL; JEROME J. SHESTACK; BARRY SIMON; DAVID SMITH; DELBERT D. SMITH; BERNARD J. SMOLENS; RALPH S. SNYDER; CARL A. SOLANO; BARRY R. SPIEGEL; GERARD J. ST. JOHN; CLINTON A. STUNTEBECK; DENNIS R. SUPLEE; SHERRY A. SWIRSKY; JOSEPH A. TATE; IRA P. TIGER; MARTIN WALD; RALPH G. WELLINGTON; MARGARET S. WOODRUFF; JOHN M. WYSER-PRATTE, ALL DEFENDANTS

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. . No. 93-cv-05611)
District Judge Honorable John P. Fullam

Submitted Under Third Circuit LAR 34.1 (a)
November 4, 1994
Before: Mansmann, Hutchison and Lewis, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

Attest:

P. Douglas Sisk, Clerk

Dated: November 30, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed March 6, 1991

Clerk, U.S. District Court
District of Columbia

JACQUELYNE L. NEAL,
Plaintiff,

v.

WILLIAM H. BROWN, III, et al.,
Defendants.

Civil Action No.
90-2677 (RCL)

MEMORANDUM OPINION

This matter comes before the court initially on plaintiff's motion for expedited consideration of plaintiff's motion to enjoin defendants from proceeding with prosecution of a pending civil action brought in the Eastern District of Pennsylvania. Because the Pennsylvania case will be placed on that court's trial scheduling list on March 8, 1991, plaintiff's motion for expedited consideration is GRANTED.

Before the court can decide plaintiff's request for an injunction, however, the court must first determine its own jurisdiction. Plaintiff earlier filed a motion to remand this case to Superior Court, claiming this case was improperly removed by defendants.

The original complaint herein was filed in Superior Court on October 5, 1990, naming the law firm Schnader, Harrison, Segal & Lewis, along with 5 individuals. It is undisputed that none of these 5 individuals is a resident of the District of Columbia, and plaintiff is a resident of Tennessee. Defendants removed this action on October 26. Plaintiff thereafter filed an amended complaint naming all of the individual partners of the law firm as defendants.

Since a partnership lacks capacity to be sued in the District of Columbia under the circumstances alleged here, and since none of the 5 individual defendants at the time the case was removed was a citizen of the District of Columbia, there was complete diversity and this case was properly removed to this court. See Day v. Avery, 548

F.2d 1018 (D.C. Cir. 1976), cert. den. 431 U.S. 908 (1977). Propriety of removal is determined solely on the basis of the pleadings at the time of removal. Pullman Co. v. Jenkins, 305 U.S. 534 (1939). Accordingly, this court has subject matter jurisdiction over this case and plaintiff's motion to remand is DENIED.

The underlying case here involves a dispute over the legal fees charged to plaintiff in connection with a Title VII case she brought against EEOC. After the suit was filed, defendants herein filed their own suit against plaintiff in the Eastern District of Pennsylvania. This court agrees that all of the parties' claims which survive preliminary motions should be tried in one federal court. Unfortunately, defendants' motion to dismiss this action, and for partial summary judgment, is not yet ripe. Defendants failed to timely file a statement of material facts as required by Local Rule 108(h) with their motion. Defendants have now lodged such a statement with the Clerk, with a motion for leave to file it. The court hereby exercise its discretion, rejects plaintiff's opposition, and GRANTS defendants leave to file their statement of material facts as lodged with the Clerk of Court.

Plaintiff, however, must now be given an opportunity to amend her statement of genuine issues and supplement her opposition to defendants' motion to dismiss or for partial summary judgment. Plaintiff shall do so within 10 days of this date, or such further time as this court may allow upon proper application. Defendants may, within 7 days of plaintiff's supplement memorandum, file any final reply brief. The court will then promptly rule so that transfer of any of this case that remains can be promptly considered, if the trial has not already been held in Pennsylvania.

In the meantime, this court will DENY plaintiff's motion to enjoin defendants from prosecuting their action in Pennsylvania. Chief Judge Bechtle has already ruled on this precise question when he refused to stay proceedings therein. He still has the opportunity to accept plaintiff's argument, before trial, and this provides an adequate remedy at law, thereby precluding injunctive relief. In any event, it would be inappropriate for this court to overrule Chief Judge Bechtle, which is the effect of the relief sought by plaintiff. Accordingly, plaintiff's motion to enjoin prosecution of the Pennsylvania

action is DENIED.

The Clerk shall mail a copy of this order to Chief Judge Bechtle as well as the parties herein.

SO ORDERED.

Royce C. Lamberth
United States District Judge

DATE: March 6, 1991

Copy to:

The Honorable Louis Charles Bechtle, United States
District Court for the Eastern District of Pennsylvania
17613 U.S. Courthouse
Independence Mall West,
601 Market Street
Philadelphia, PA 19106

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Filed March 26, 1991

FRANCIS ABBOT, et al.	)	
	)	
v.	)	Civil Action
	)	No. 90-6619
JACQUELINE NEAL	)	
	)	

MEMORANDUM AND ORDER

BECHTLE, Ch. J. March 26, 1991

Presently before the court is defendant's motion to dismiss. For the reasons that follow, defendant's motion will be granted.

FACTS

This case arises out of a fee dispute between plaintiffs, partners in the Philadelphia law firm of Schnader, Harrison, Segal and Lewis ("Schnader")[1], and Jacqueline Neal, a former Schnader client. In 1986, Schnader was successful in representing Neal in a sexual discrimination suit before the Merit System Protection Board ("MSPB") against her former employer, the Equal Employment Opportunity Commission. Pursuant to the fee agreement between Schnader and Neal, Neal had paid certain fees to Schnader while her case was proceeding before the MSPB. The fee agreement stated that these fees were to be returned to Neal to the extent that any attorney's fees awarded plus the amounts paid by Neal exceeded Neal's financial obligation to Schnader. The MSPB awarded Schnader, as counsel for the prevailing plaintiff in the MSPB proceeding, attorney's fees of $56,134.95. Schnader claims that this amount was insufficient to satisfy Neal's obligation to the firm. Schnader sent a refund check representing what Schnader claims

1. For purposes of clarity, the court will hereinafter refer to the plaintiffs collectively as "Schnader"; it should be remembered, however, that the actual plaintiffs in this action are the individual law firm partners, and that the law firm, as an entity unto itself, is not a party to this action.

is the amount of fees previously paid by Neal less the amount of the alleged insufficiency.

Neal took issue with the amount of her refund. After several unsuccessful attempts to negotiate a resolution to the dispute with representatives of Schnader, Neal began "picketing" in front of Schnader's Philadelphia office building. Several months later, Neal began picketing in front of Schnader's Washington, D.C. office location. Additionally, Neal allegedly sent letters to several Schnader clients that set forth Neal's version of the facts surrounding the fee dispute.

On October 5, 1990, Neal filed suit in the Superior Court of the District of Columbia. Neal's complaint alleges that Schnader improperly withheld fees paid by Neal, and raises claims for breach of contract, fraud, deceit, and intentional infliction of emotional distress. On October 15, 1990, Schnader filed the instant action in this court. In this action Schnader seeks a declaratory judgment to the effect that: 1) Schnader is obligated to pay Neal no more than approximately $3,000.00 more than the amount of the tendered refund, and 2) Schnader was defamed by statements made by Neal in her letters and on her picketing placards. On October 26, 1990, Schnader removed Neal's District of Columbia Superior Court action to the United States District Court for the District of Columbia. Neal's motion to remand was denied by that court on March 6, 1991. Schnader's motion to dismiss is currently pending before the District of Columbia District Court.

Neal now moves for the dismissal of the action filed by Schnader in this court. For the reasons set forth below, Neal's motion will be granted.

DISCUSSION

In addressing the motion to dismiss, the parties' briefs raise issues related to whether Schnader's claim for relief is properly the subject of a declaratory jugement action, and whether principles of judicial economy require dismissal. The court, however, finds that the federal compulsory counterclaim rule, set forth in Fed.R.Civ.P. 13(a), is the authority that most directly affects the outcome of this motion to dismiss.

In relevant part, Rule 13(a) states:

> Compulsory Counterclaims. A Pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action . . .

There is no room for argument on the question of whether Schnader's claim in this action "arises out of the transaction or occurrence" that is the subject of the action now pending before the District of Columbia District Court. In this court, Schnader seeks a judicial declaration that its conduct does not amount to a breach of its contract with Neal. In the District of Columbia District Court, Neal asserts that this same conduct amounts to a breach of the same contract. A closer connection between two claims could not be contemplated. Further, Schnader's additional action for a declaration that it has been defamed by Neal's statements most certainly stems from the same transaction that is the subject of the District of Columbia District Court action, i.e. the fee dispute.

Rule 13(a) also provides that a counterclaim may not be treated as compulsory in a given action if "at the time the action is commenced, the claim is already the subject of another pending action." Application of this principle to the case at hand raises the issue of when a removed action should be deemed "commenced" for purposes of Rule 13(a). Keeping in mind the chronological order of the relevant filings (first the filing of the complaint in D.C. Superior Court, then the filing of the complaint in this court, then the removal of the D.C. action to the District Court for the District of Columbia) the question becomes whether the District of Columbia action was "commenced," for Rule 13(a) purposes, when it was filed in the District of Columbia Superior Court or when it was removed to the District of Columbia District Court. If the District of Columbia District Court action, for Rule 13(a) purposes, was "commenced" when it was filed on October 5, 1990 in the District of Columbia Superior Court, the Schnader claim was not then pending in any court proceeding and must, therefore, be raised in the present District of Columbia proceeding as a compulsory counterclaim; if the District

of Columbia District Court action was not "commenced" until removal, however, the Schnader claim was already pending at that time in this court, in which case Schnader cannot be compelled to raise it as a counterclaim in the District of Columbia District Court.

The court finds that the District of Columbia action was commenced, for purposes of Rule 13, at the time of the initiation of the action in the District of Columbia Superior Court. Several factors support this result. First, this decision best promotes the policy underlying the exception to the compulsory counterclaim rule now at issue. The "pending action" exception was designed to promote the same interest that underlies the well-established "first filed" rule: the forum chosen by a plaintiff for resolution of a particular claim should not be susceptible to modification by virtue of a later claim filed by the defendant. Like the first filed rule, the "pending action" exception to Rule 13 is designed to protect the party who first initiates an action from litigating that action in a forum of another's choosing. This policy is best served in the case at hand by deeming the District of Columbia action to have been commenced in Superior Court, in that Neal, as the plaintiff who first initiated her action in the District of Columbia, has chosen that locale for the resolution of her dispute, including any compulsory counterclaims that should be included. As noted earlier, the District of Columbia Court has ruled that it retains subject matter jurisdiction over Neal's claims. By not requiring the compulsory counterclaim rule to apply to the Superior Court filing, the court would effectively allow Schnader to defeat Neal's first choice of forum location, thereby undermining Neal's status as the initiator of the first action related to all of the transactions at issue. Second, the plain meaning of the language of Rule 13(a) itself supports the conclusion that a removed action must be deemed commenced at the time of the filing of the state court complaint. The rule contains no expressed limitations on the word "commenced," i.e. there is no command to interpret the word "commenced" to mean "commenced in federal court." Finally, the court notes that Rule 13(a) of the District of Columbia Superior Court Rules is essentially identical to Rule 13(a) of the Federal Rules, so that Schnader's claim was a compulsory counterclaim in the Superior Court before the action was removed. There is nothing to be served in the proper administration of the dispute between the parties that supports allow-

ing the removal of an action from a jurisdiction that employs a compulsory counterclaim rule to another jurisdiction that employs a compulsory counterclaim rule to defeat the applicability of the compulsory counterclaim rule.[2]

CONCLUSION

For the foregoing reasons, Schnader's complaint is dismissed as a compulsory counterclaim that must be raised in the action between the parties now pending in the District Court for the District of Columbia. This dismissal is without prejudice to Schnader's ability to assert its claim as a counterclaim in that action. An appropriate order will be entered.[3]

---

2. The court's decision today is in accord with W. A. Krueger Co. v. Ottenheimer Publishers, 458 F. Supp. 1082, 1085 (E.D. Wisc. 1978) (suggesting that removed actions are commended at the time of the state court filing for purposes of Rule 13(a)).

3. Schnader is free, of course, to raise its counterclaim in the District of Columbia District Court and subsequently move for transfer of that action to this court. Nothing in this memorandum should be construed as a comment on whether such a transfer would be appropriate.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANCIS ABBOT, *et al*	)	
	)	
v.	)	CIVIL ACTION
	)	No. 90-6619
JACQUELINE L. NEAL	)	
	)	

ORDER

AND NOW, TO WIT, this 26th day of March, 1991, upon consideration of defendant's motion to dismiss, IT IS ORDERED that said motion is granted. This dismissal is without prejudice to plaintiffs' right to assert their claims in the action between the parties now pending in the United States District Court for the District of Columbia.

LOUIS C. BECHTLE, Ch. J.

Entered: March 27, 1991
Clerk of Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed Nov. 19, 1991 — Clerk, U.S. District Court, District of Columbia

JACQUELYNE L. NEAL,
Plaintiff,

v.

WILLIAM H. BROWN, et al.,

Defendants.

Civil Action No. 90-2677 (RCL)

MEMORANDUM AND ORDER

This matter comes before the court upon plaintiff's motion for injunction pending appeal pursuant to Fed. R. Civ. P. 62(c). On March 29, 1991, plaintiff filed her notice of appeal. Plaintiff appealed this court's order of March 6, 1991, in which the court denied plaintiff's motion to remand the case to the Superior Court for the District of Columbia, and denied plaintiff's motion to enjoin defendants from prosecuting their action in Pennsylvania. Plaintiff asserts that the court abused its discretion in denying her motion for injunction because the case should be tried in one federal court. Further, plaintiff alleges that the court abused its discretion in denying her motion to remand the case to Superior Court because this court lacks diversity jurisdiction.

Plaintiff's motion to stay the proceedings so that plaintiff can appeal this court's order of March 6, 1991, shall be denied. Defendant correctly states that plaintiff's motion to enjoin defendants from prosecuting their action in Pennsylvanis is moot. The case that was pending before the United States District Court for the Eastern District of Pennsylvania, Abbot, et. al. v. Neal, Civil Action No. 90-6619, was dismissed on March 26, 1991, on the ground that Schnader,

Harrison's complaint should be raised as a compulsory counterclaim in this case.

The issue of whether this court erred in denying plaintiff's motion to remand the case to Superior Court, however, does not appear to be a final, appealable order and plaintiff has no likelihood of success on the merits, nor any irreparable injury. Accordingly, it is hereby ORDERED that plaintiff's motion for an injunction pending appeal is DENIED.

In connection with her stay motion, plaintiff filed an affidavit requesting recusal of the undersigned judge. There is no basis for recusal, and plaintiff's request is DENIED.

Plaintiff has alleged no facts which show personal bias or prejudice in favor of defendants or against her. There is no claim that I have any personal knowledge about the facts of this case, except what I have learned from the parties in this litigation. Plaintiff is understandably dissatisfied with my rulings against her on March 6, 1991, on various motions. Those rulings will be subject to appellate review, either now — as plaintiff is currently seeking — or after a final judgment. But those rulings do not provide a basis for recusal.

Plaintiff exhibits a profound misunderstanding of how busy trial courts operate. She argues that because her pending motions were ripe for decision, one for several weeks, my March 6 ruling had been "deliberately withheld". Plaintiff fails to recognize that her case is just one of hundreds pending in this court, and that a delay of a few weeks in acting on a motion is, unfortunately, not at all unusual. It is not an intentional action by the court; it is just a fact of life of a busy trial court juggling a heavy docket of civil and criminal cases. This delay does not demonstrate bias or prejudice.

Plaintiff also exhibits that she has misunderstood various ex parte conversations she has had with the court's law clerks. Accordingly, plaintiff is hereby ORDERED not to directly contact the court's chambers under any circumstances. Her communications should be orally, in open court, at any hearings held, or in writing, filed with

the Clerk and served on opposing counsel. Defendant's counsel similarly are ORDERED not to directly contact the court's chambers on this case.

SO ORDERED.

Royce C. Lamberth
United States District Judge

Date: Nov. 19, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed Nov. 20, 1991 — Clerk, U.S. District Court, District of Columbia

JACQUELYNE L. NEAL,
Plaintiff,

v.

WILLIAM H. BROWN, III, et al.,

Defendants.

Civil Action No. 90-2677 (RCL)

MEMORANDUM OPINION

I. Introduction

This case comes before the court upon defendants' motion to dismiss the action and for partial summary judgment. Plaintiff who appears pro se, brought this action against multiple defendants. They are: the members of Schnader, Harrison, Segal & Lewis ("Schnader, Harrison" or "the firm"),[1] a law firm which is based in Philadelphia, Pennsylvania and which represented plaintiff in her sexual harassment and retaliatory termination action against the Equal Employment Opportunity Commission ("EEOC"); Lewis R. Moffa ("Moffa"), the attorney who works in Schnader, Harrison's Washington, D.C. branch office and who represented plaintiff in her suit against the EEOC; and Bernard Segal ("Segal"), who appears to have been a partner at Schnader, Harrison for part of the time that is relevant to this suit.

Plaintiff's claim arises out of a contract dispute between plaintiff and defendants. On August 29, 1986, plaintiff executed an agreement with Schnader, Harrison whereby plaintiff retained the firm to

[1] Plaintiff's amended complaint lists every attorney who is a member of Schnader, Harrison as a defendant.

represent her in her sexual discrimination suit against the EEOC which was tried by the Merit System Protection Board ("MSPB"). Amended Complaint ("Am. Cplt.") ¶ 4. This agreement states, in essence, that plaintiff would pay Schnader, Harrison certain fees while her case was proceeding before the MSPB, and that these fees would be returned to plaintiff to the extent that any attorney's fees awarded by the MSPB plus the amounts paid by plaintiff exceeded the total amount owed by plaintiff to Schnader, Harrison for their services. Specifically, the agreement states that Schnader, Harrison would represent plaintiff:

> on the condition that you (plaintiff) remit a deposit in the amount of $5,000.00. You will receive a detailed bill from our Firm each month for services rendered and expenses incurred during the month. You will be expected to pay the monthly bills for services rendered and expenses as received and the deposit will not be applied against the fees and expenses incurred in connection with our representation. You will be expected to maintain a level of $5,000.00 from month to month.
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> It is understood that we (the firm) will attempt to secure attorney fees for you in any successful action against the Equal Employment Opportunity Commission and/or individuals. To the extent we are successful in obtaining payment of attorney fees, you will be given credit for the full amount of fees recovered against any remaining balance due our Firm. To the extent the recovered fees exceed any balance due the Firm, you will be paid the balance remaining. The same arrangements will apply to any expenses or costs which we are paid by the Equal Employment Opportunity Commission and/or individuals.

Plaintiff prevailed in her claim against the EEOC and the MSPB awarded her $56,134.95 in attorney's fees and expenses, which were paid directly to Schnader, Harrison. Am. Cplt. ¶ 10. Schnader, Harrison stated that at the time of the award plaintiff owed the firm $42,733.48, and thus on July 13, 1987, it paid plaintiff the balance of the award, which is $13,401.47. On the other hand, plaintiff asserts that during the course of the proceedings she paid $30,285.74 in

attorney's fees and expenses and that she deserves to recover that entire amount. Id. at ¶¶ 12-14. Consequently, plaintiff brought the present action to recover the remaining $16,884.27.

After receiving the check for $13,401.47 plaintiff made various efforts to recover the balance of her refund payment. Id. at ¶ 15. Plaintiff requested a meeting with Segal, id., she filed a complaint with defendant Arthur Kahn ("Kahn") on January 4, 1988, which stated that he deliberately withheld over $6,500.00 from the motion for attorney's fees that was filed with the MSPB, id., and she wrote Kahn on March 24, 1988, to go over her complaint with the firm. Id. at ¶ 17. Finally, in March of 1988, after Kahn refused to personally evaluate the merits of plaintiff's complaints, plaintiff states that she was put on notice of defendant's breach of contract. Id. at ¶ 19.

Plaintiff's complaint contains four claims: breach of contract (count one), deceit (count two), fraud (count three) and intentional infliction of emotional distress (count four). Since plaintiff appears pro se, the court holds plaintiff to a less stringent pleading standard and considers all of plaintiff's claims in the light most favorable to her. See Haines v. Kerner, 404 U.S. 519, 520-21 (1971) reh'g. den. 405 U.S. 948 (1972); Brandon v. District of Columbia Bd. of Parole 823 F. 2d 644, 646 (D.C. Cir. 1987).

III. Discussion

Defendants' motion contains eight grounds for either dismissal or summary judgment. First, defendants move for summary judgment in favor of all defendants because plaintiff's breach of contract claim is barred by the District of Columbia's three year statute of limitations.[2] D.C. Code § 12-301(7) (1981). Defendants state that plaintiff had actual knowledge of all the facts that gave rise to her breach of contract claim by, at the latest, July of 1987, and yet plaintiff

[2] Although defendants did not address the conflict of laws question presented here, defendants correctly state that the District of Columbia's statute of limitations applies. The contract at issue has contacts with more than one jurisdiction, but since the District of Columbia treats statutes of limitations as procedural, its statutes of limitations apply to all diversity cases that are brought in this forum. See Hoffa v. Fitzsimmons, 673 F.2d 1345, 1361 (D.C. Cir. 1982); 620 F. Supp. 109, 114 (D.D.C. 1985).

did not file her complaint herein until October 5, 1990.

Section 12-301(7) states that the statute of limitations for a breach of contract action is three years from the time that the cause of action accrues. In breach of contract cases, causes of action are deemed to accrue at the time that the contract is breached. See Akins v. Washington Metropolitan Area Transit Authority, 729 F. Supp. 903, 905 (D.D.C. 1990) (citing Western Union Telegraph Co. v. Massman Construction Co., 402 A.2d 1275, 1277 (D.C. 1979); Fowler v. A & A Co., 262 A.2d, 344, 347 (D.C. 1970)).

In the present case, any breach of the contract occurred on July 13, 1987, the date when defendants sent plaintiff the check for $13,401.47. It is at this point that defendants, according to plaintiff, breached their obligation by not refunding her the total amount that she believed that she was owed. Accordingly, the three year statute of limitations has run on this cause of action and plaintiff's breach of contract claim is time barred.

Plaintiff argues her breach of contract claim is not time barred because the statute of limitations did not begin to run until she knew that defendants had breached the contract. Plaintiff states that her many efforts to correct the erroneous charges, such as her complaint to Schnader, Harrison and her communications with Segal and Kahn, demonstrate that she was "without knowledge that Defendants would not rectify the billing statements; and therefore, Plaintiff was without knowledge of all the facts that would constitute a breach of contract claim." Plaintiff's Opposition to Defendants' Motion to Dismiss or for Partial Summary Judgment ("Pl. Opp."), 12 (emphasis in original).

Plaintiff is incorrect on this ground. Any billing error by defendants marks their breach of the agreement with plaintiff and the time at which the cause of action accrued. All subsequent efforts by plaintiff were merely attempts to remedy that breach. Accordingly, defendants' motion for summary judgment on the breach of contract claim shall be granted. There is no genuine issue of material fact as to when the contract was breached, and more than three years

elapsed between the date of the breach and the date that plaintiff filed this suit.[3]

In the context of her breach of contract claim plaintiff states in her complaint that "defendant would be unjustly enriched if it is permitted to retain the $16,884.27." Am. Cplt. ¶ 17. This language suggests that plaintiff may be asserting a claim of quantum merit or quasi-contract. Such a claim, if truly asserted by plaintiff, would be dismissed. Plaintiff does not assert that she conferred any benefit upon defendants for which she deserves compensation.

Second, defendants assert that plaintiff's action against Segal should be dismissed because plaintiff has failed to state a claim against him and because both the Superior Court of the District of Columbia and this court lack personal jurisdictionn over him. Defendants assert that plaintiff's sole reference to Segal in her complaint is that she requested a personal meeting with him and that her request was denied. Defendants' Motion to Dismiss, 12. Defendants argue that Segal's refusal to meet with her is insufficient to give rise to any of plaintiff's claims and is insufficient to allow this court to exercise jurisdiction over Segal.

Plaintiff, in her opposition to defendants' motion to dismiss, disputes defendants' assertion.[4] Specifically, plaintiff points out that Segal was a senior partner at the time that plaintiff retained Schnader, Harrison, that Segal had discussed plaintiff's allegations with the firm's chairman on October 30, 1987, that on December 5, 1989, plaintiff spoke with Segal regarding the complaint that plaintiff filed with the firm, and that Segal then discussed plaintiff's allegations with Kahn and that they decided to assign her complaint for an independent evaluation. Pl. Opp. 17-18.

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[3] In light of this finding, the court need not address defendants' fifth ground for dismissal, in which defendants move to dismiss plaintiff's breach of contract claim against Segal and Moffa for failure to state a claim.

[4] When considering a motion to dismiss, the court looks to the facts as asserted by plaintiff in her amended complaint. Since plaintiff appears pro se, however, the court will consider all of the factual allegations that plaintiff asserts in her various pleadings, since the court could grant plaintiff leave to add the allegations that she makes in her other pleadings to her amended complaint.

Defendants' motion to dismiss plaintiff's claims against Segal shall be granted because plaintiff fails to state a claim upon which relief can be granted against him. Plaintiff's allegations merely state that she discussed this matter with Segal. Plaintiff does not allege that Segal engaged in any fraud or deceit, or in any way manipulated the firm's billing of plaintiff in this case. As a result, plaintiff's claims against Segal cannot withstand defendants' motion to dismiss. Further, since plaintiff fails to state a claim of fraud or deceit against Segal the court need not reach the question of whether this court has personal jurisdiction over Segal.

Third, defendants move for summary judgment on behalf of Moffa because plaintiff's claims against him are barred by the statute of limitations. The statute of limitations for plaintiff's fraud and deceit claims is three years. D.C. Code § 12-301(8) (1981). Defendants assert that plaintiff had actual knowledge of all the facts that gave rise to her fraud and deceit claims when she received her check from the firm in July of 1987. Defendants also claim that on July 20, 1987, plaintiff informed Moffa of her dispute with him, and that this was the last time that Moffa had any contact with plaintiff.

Plaintiff, in her opposition to defendants' motion, states that up until March of 1988 (less than three years before this suit was filed on October 5, 1990) Moffa had indicated to her that she would obtain an additional refund payment from the firm. Pl. Opp. at 23. This allegation alone presents a genuine issue of material fact as to whether plaintiff's claims of fraud and deceit against Moffa are barred by the statute of limitations. As a result, defendants' motion for summary judgment on behalf of Moffa is denied as to plaintiff's claims of fraud and deceit.

Defendants, as their fourth ground, move for dismissal of this action against Brown, Kahn, Mullinix and Moffa for insufficiency of services of process.[5] Defendants argue that the service of process of these individuals is insufficient because plaintiff served their secretaries or receptionists instead of serving them individually, in violation of Fed. R. Civ. P. 4 (d) (1).

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[5] Defendants also move to dismiss plaintiff's action against Segal on this ground. Since plaintiff fails to state a claim against Segal, however, the court need not address whether plaintiff's service on Segal was sufficient.

The court recognizes that Rule 4 (d) (1) requires that service be performed upon the individual or an agent authorized to receive process, and that defendants never authorized their secretaries or receptionists to accept service of process on their behalf.[6] Further, Rule 12 (b) (4) provides for a motion to dismiss for insufficiency of process. Under this rule, however, courts enjoy broad discretion over whether to dismiss an action for insufficient service or to simply quash service, in which case service need only be repeated. Wright & Miller § 1354.

In general, dismissal is not appropriate when it appears that service can reasonably be obtained, especially when defendants have been put on notice of the complaint. See Novak v. World Bank, 703 F.2d 1305 (D.C. Cir. 1983). In the present case, plaintiff appears pro se and thus should be given a second opportunity to properly serve defendants. Defendants' defense has not been prejudiced by this error and thus defendants' motion shall be denied. Plaintiff's service of these defendants shall be quashed and plaintiff will be given another chance to serve these defendants properly.

Defendants, in their sixth ground for dismissal, assert that plaintiff's claims of fraud and deceit against all defendants should be dismissed for failure to state a claim upon which relief can be granted. Defendants assert that in order to state a claim for either fraud or deceit, a plaintiff must show the following five elements: (1) a false representation; (2) concerning a material fact; (3) made with knowledge of its falsity; (4) with intent to deceive; and (5) upon which plaintiff relied. Kropinski v. World Plan Executive Counsel, 853 F.2d 948, 953 (D.C. Cir. 1988); Higgs v. Higgs, 472 A.2d 875, 876 (D.C. App. 1984). See also Restatement (Second) of Torts §§ 525, 526, 531, 537, 538 (1977). Further, defendants state that pursuant to Fed. R. Civ. P. 9(b), plaintiff must plead fraud and deceit with particularity.

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[6] See affidavits of Brown, Moffa, and Kahn, exhibits A, B, C and D attached to defendants' motion to dismiss or for summary judgment.

According to the authority cited by defendants,[7] their motion to dismiss plaintiff's fraud and deceit claims must fail. Plaintiff, in her amended complaint, pleads enough facts with sufficient particularity to survive defendants' motion to dismiss these two claims. Specifically, plaintiff asserts that "Defendant deliberately withheld, without Plaintiff's knowledge, more than $6,500.00 of charges from its motion for attorney fees, which Plaintiff uncovered during her in-depth analysis of the balloon final bill." Am. Cplt. ¶ 15. Plaintiff also states that:

> Defendant, by and through Moffa, and Defendant's paralegal, Lisa Ray . . . padded billing statements, reflected charges for work which was not performed, as well as reflected outright fabrications in the billing statements, and the fraudulent acts, which were uncovered by Plaintiff, declares the entire bill as questionable. Defendant, in several instances regarding charges claimed, represented a lower expenditure of time in its motion for attorney fees to MSPB, and reflected a higher expenditure of time in the final bill to Plaintiff for the corresponding work on the corresponding dates.

Id. at ¶ 16. Plaintiff also alleges that defendant has continuously withheld plaintiff's additional refund payment. Id. at ¶¶ 20-22. See also id at ¶¶ 34, 35, 39-41.

These statements clearly allege, with sufficient particularity for the present case, that defendants made false representations concerning material facts with knowledge of their falsity with intent to deceive and upon which plaintiff relied. Accordingly, defendants' motion to dismiss these claims shall be denied.

Defendants do not squarely present the issue[8] of whether plain-

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[7] It is important to note that the court is not convinced that District of Columbia law governs these claims. Under District of Columbia law, the forum applies the law of the state which has the greatest interest in the outcome of the issue. See Blair v. Prudential Ins. Co. of America, 472 F.2d 1356, 1359 (D.C. Cir. 1972); Packer v. Kaiser Foundation Health Plan of Mid-Atlantic States, Inc., 728 F. Supp. 8, 10 (D.D.C. 1989). Thus it is likely that Pennsylvania law governs these claims.

[8] This is with the exception of Moffa. Defendants, in the third ground of their motion, move for summary judgment for Moffa because all claims against him are barred by the statute of limitations. See Discussion supra.

tiff's fraud and deceit claims are barred by the statute of limitations. The record does not at this stage clearly demonstrate whether plaintiff was receiving detailed monthly bills contemporaneously, or whether she made reasonable inquiries or exercised due diligence prior to October 5, 1987, three years before this cause of action was filed. The record also does not reflect when plaintiff knew or should have known the contents of the request for attorney's fees that the firm submitted to the MSPB.

Defendants' seventh ground for dismissal states that plaintiff's claim for intentional infliction of emotional distress should be dismissed for failure to state a claim. Defendants' motion to dismiss this claim shall be granted. In order to plead a claim of intentional infliction of emotional distress, the plaintiff must demonstrate outrageous behavior or conduct by defendant that intentionally or recklessly causes the plaintiff emotional distress. See Restatement (Second) of Torts § 46 (1965); Sere v. Group Hospitalization, 443 A.2d 33, 37 (D.C. Appl.) cert. denied 459 U.S. 912 (1982); Kazatsky v. David King Memorial Park, 515 Pa. 183, 527 A.2d 988, 991 (1987); Cucinatti v. Ortman, 339 Pa. 26, 159 A.2d 216, 219 (1960). Further, the emotional distress shown by plaintiff must be severe and outrageous when judged by an objective standard, that is it must be considered to be severe and outrageous by a reasonably prudent person under the circumstances. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 12 (5th ed. 1984).

In the present case, plaintiff does not show the factors necessary to support this claim. Plaintiff states that she has "undergone physical as well as mental abuse" in her various protests that were staged outside of Schnader, Harrison's Philadelphia and District of Columbia offices. Am. Cplt. at ¶ 21. Plaintiff further states that the withholding of her additional refund by defendants has caused her "extreme mental anguish and emotional distress." Id. at ¶ 22. See also id. at ¶¶ 46-71.

Although it is clear from plaintiff's filings that plaintiff has suffered greatly from this chain of events, plaintiff fails to demonstrate that defendants' conduct is so outrageous, when judged by an objective standard, that it supports a claim of intentional infliction of

emotional distress. Thus, defendants' motion to dismiss this claim shall be granted.

Defendants' last ground for dismissal goes to damages. Defendants state that any claims for damages that go beyond the amount of fees and expenses disputed by plaintiff should be dismissed because they were not caused by defendants. Plaintiff seeks $100,000.00 as damages for fraud, Am. Cplt. ¶¶ 36-37, and $1,500,000.00 as damages for deceit. Am. Cplt. ¶¶ 44-45. Defendants' motion shall be denied. It is too early in the proceedings for the court to determine the extent of any damages that plaintiff may or may not be able to recover on her remaining claims for fraud and deceit. Accordingly, defendants' motion to dismiss plaintiff's claims for these damages shall be denied.

A separate order shall issue this date.

Royce C. Lamberth
United States District Judge

Date: Nov. 19, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed Nov. 20, 1991 — Clerk, U.S. District Court, District of Columbia

JACQUELYNE L. NEAL,
Plaintiff,

v.

WILLIAM H. BROWN, III, et al.,

Defendants.

Civil Action No. 90-2677 (RCL)

ORDER

For the reasons stated in the memorandum opinion issued on this date, it is hereby ORDERED that

1. Defendants' motion for summary judgment for all defendants on plaintiff's breach of contract claim is GRANTED. Plaintiff's count one is DISMISSED WITH PREJUDICE.

2. Defendants' motion to dismiss all of plaintiff's claims against Segal is GRANTED.

3. Defendants' motion for summary judgment on behalf of Moffa is DENIED regarding plaintiff's claims of fraud and deceit.

4. Defendants' motion to dismiss plaintiff's actions againt Brown, Kahn, Mullinix and Moffa is DENIED regarding plaintiff's claims of fraud and deceit. Plaintiff's service of these defendants is, however, quashed and plaintiff is directed to properly serve these defendants.

5. Defendants' motion to dismiss plaintiff's claims of fraud and deceit is DENIED. All defendants, except Segal, will be required to respond to counts two and three of the amended complaint.

6. Defendants' motion to dismiss plaintiff's claim of intentional infliction of emotional distress against all defendants is GRANTED. Plaintiff's count four is DISMISSED WITH PREJUDICE.

7. Defendants' motion to dismiss any of plaintiff's claims for damages that exceed the amount of charges disputed by plaintiff is DENIED.

SO ORDERED.

Royce C. Lamberth
United States District Judge

Date: NOV. 19, 1991

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

Filed Dec. 11, 1992 Issuance of mandate stayed pending filing of Petition for Writ of Certiorari

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 16, 1992 Decided December 11, 1992

No. 91-5089

Jacquelyne L. Neal, Appellant

v.

William H. Brown, III, et al, Appellees

Appeal from the United States District Court for the District of Columbia (Civil Action No. 90-02677)

Jacquelyne L. Neal, appellant *pro se*.

Edward W. Mullinix, with whom *Thomas E. Patton*, was on the brief, for appellees.

William F. Fox, Jr. (appointed by this Court). for *amicus curiae*.

Before Wald, Silberman and D. H. Ginsberg, *Circuit Judges*.

Opinion for the Court *Per Curiam*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Per Curiam: Stripped to its essentials, this case presents the question whether a federal district court's denial of a motion to remand is subject to interlocutory review. We hold that it is not and accordingly dismiss this appeal for lack of jurisdiction.

Although the disposition of this appeal is straightforward, its path to this court was not. Appellant Jacquelyne Neal, a citizen of Tennessee, initially brought this action in the Superior Court of the District of Columbia on October 5, 1990. She named as defendants the law firm of Schnader, Harrison, Segal & Lewis, a partnership in the District of Columbia, along with five individuals. Ten days later, the law firm, or more precisely, some of its partners, filed an action against Ms. Neal in the U.S. District Court for the Eastern District of Pennsylvania. On October 26, 1990, defendants filed a notice of removal in the U.S. District Court for the District of Columbia under 28 U.S.C. § 1441(b), which permits removal when there is complete disversity of citizenship and no defendant properly joined and served as a citizen of the state in which the action is brought. As it turns out, none of the individuals named in Ms. Neal's complaint was a citizen of the District of Columbia, and under D.C. law, a partnership cannot be sued as an entity. *Day v. Avery,* 548 F.2nd 1018, 1022, (D.C. Cir. 1976), *cert. denied,* 431 U.S. 908 (1977).

Ms. Neal, who filed this action *pro se,* was understandably not aware of these intricacies of subject matter jurisdiction and removal. After receiving the defendants' notice of removal, she amended her complaint to add other members of the partnership, three of whom were, in fact, citizens of the District of Columbia. She then moved to remand to the D.C. Superior Court. Some time later, she sought to enjoin the defendants from pursuing their action against her in Pennsylvania. This motion for an injunction eventually became moot when the federal court in Pennsylvania dismissed defendants' action there as a compulsory counterclaim to Ms. Neal's action here. This left for determination only Ms. Neal's motion for remand, which the district court below denied. It is this denial that Ms. Neal now appeals.

Her appeal is premature. As a general matter, federal courts of

appeals have jurisdiction only over "final decisions" of the district courts. 28 U.S.C. § 1291. The Supreme Court has defined as "final" only a decision that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) *(quoting Catlin v. United States*, 324 U.S. 229, 233 (1945)). The decision to deny the remand clearly does not end the litigation, but merely determines that it will proceed in federal court. In holding that a denial of a motion to remand is not appealable under § 1291, we are in accord with every other federal court of appeals that has addressed this issue. *See e.g., Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272 (9th Cir. 1990); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860, 861-62 (7th Cir.), *cert. denied*, 469 U.S. 890 (1984); *Poirrier v. Nicklos Drilling Corp.*, 648 F.2d 1063, 1064-65 (5th Cir. 1981); *Three J Farms v. Alton Box Board Co.*, 609 F.2d 112, 113 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Aberle Hosiery Co. v. American Arbitration Ass'n*, 461 F.2d 1005, 1006 (3d Cir. 1972); *Brough v. United Steelworkers of America*, 437 F.2d 748, 749-50 (1st Cir. 1971); *Wilkins v. American Export-Isbrandtsen Lines, Inc.*, 401 F.2d 151, 151 (2d Cir. 1968); *see also* 15A Charles Wright, Arthur Miller & Edward Cooper, Federal Practice and Procedure § 3914.11, at 697 (3d ed. 1992) ("One aspect of appealing orders as to removal and remand remains blessedly simple. An order denying remand is not final.").

Ms. Neal and *amicus curiae*, appointed by this court, have suggested several other avenues by which this court might take jurisdiction, some of them quite creative, but all of them equally unavailing. The denial of a motion to remand does not fall within the collateral order doctrine, under which a "'small class' of decisions [is] excepted from the final-judgment rule," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) *(citing Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1940)), because such a denial does not "render impossible any review whatsoever." *Firestone Tire & Rubber Co., v. Risjord*, 449 U.S. 368, 376 (1981). *See e.g. Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d at 1274; *Rohrer, Hibler & Replogle, Inc.*, 728 F.2d at 861-62. Nor can we exercise pendent appellate jurisdiction over the remand question under 28 U.S.C. § 1292, which provides for interlocutory review of orders dealing with

injunctions, as Ms. Neal's motion for injunctive relief was moot even before she filed this appeal. *See Rodriguez v. Handy*, 802 F.2d 817, 821 (5th Cir. 1986); *Robert Stigwood Group Ltd. v. Hurwitz*, 462 F.2d 910, 914 & n.7 (2d Cir. 1972); *cf. E. P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201, 204 (D.C. Cir. 1974) (court retained jurisdiction to review grant of summary judgment after injunction became moot where only issue remaining for determination by district court was damages).[1]

Appeal dismissed.

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[1] We have considered and rejected Ms. Neal's other proposed bases for this court's exercise of jurisdiction over her appeal, including the writ of mandamus under the All Writs Act, 28 U.S.C. § 1651, and our inherent power to question, *sua sponte*, defects in subject matter jurisdiction. We do not believe either theory warrants extensive discussion here.

Because we lack jurisdiction over this appeal, we do not reach the merits of whether the remand was proper. In that regard Ms. Neal urged us to consider whether her amended complaint should relate back to her original filing for purposes of the removal statute and whether the district court was required to consider 28 U.S.C. § 1447(e), which deals with joinder after removal. These arguments can be raised in the context of any later appeal she may take.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed Jul 20, 1993 — Clerk, U.S. District Court, District of Columbia

JACQUELYNE L. NEAL,
Plaintiff,

v.

WILLIAM H. BROWN, III, et al.,

Defendants.

Civil Action No. 90-2677 (RCL)

MEMORANDUM AND ORDER

This matter comes before the court on defendants' motion to transfer this action to the United States District Court for the Eastern District of Pennsylvania, pursuant to 28 U.S.C. § 1404(a), for the convenience of the parties and the witnesses, in the interests of justice. Plaintiff opposes transfer. Upon consideration of the motion, plaintiffs' opposition, defendants' reply, and the record herein, the court GRANTS the motion to transfer.

Plaintiff is not a resident of the District of Columbia; she resides in Memphis, Tennessee. She has named all of the partners of the law firm Schnader, Harrison, Segal & Lewis as defendants in this action. In terms of the parties' convenience, plaintiff will have to travel an extra 100 miles beyond Washington, to Philadelphia, if this action is transferred, but it is undisputed in the record that the nonstop flights and the airline fares are substantially the same for flights between Memphis and Philadelphia and between Memphis and Washington, D.C. In terms of defendants, the law firm is headquartered in Philadelphia, where virtually all of the named defendants work and reside. Although defendant Louis R. Moffa, Jr., originally worked in the firm's D.C. branch office, he now — since January 1993 — works and resides in Cherry Hill, New Jersey, 20 minutes from the federal courthouse in Philadelphia. Clearly

Philadelphia is a more convenient forum for him, as well as all the other partners who are defendants who reside and work in the Philadelphia area. Defendants expect to call as witnesses, in addition to Mr. Moffa, three other named defendants — Brown, Kahn, and Mullinix — all of whom live and work in the Philadelphia area. Again, for those parties and witnesses, Philadelphia is a more convenient forum. Defendants also expect to produce the videotaped deposition of Lisa Ray, a former firm employee who now resides in Virginia. She will not, therefore, be inconvenienced by transfer.

Plaintiff claims that two attorneys in Washington will be witnesses to the validity of the law firms bills — plaintiff's former attorney and the EEOC attorney who litigated the case against plaintiff. Even assuming these two individuals have any relevant testimony, it does not appear that it would be so critical that depositions would not be a satisfactory substitute for trial testimony if they were to refuse to travel to Philadelphia to testify at trial.

This action might have been brought in the Eastern District of Pennsylvania — based on diversity jurisdiction, since plaintiff is a resident of Tennessee — and Pennsylvania is a far more convenient forum for almost all the parties and witnesses. Transfer is in the interest of justice.

Accordingly, this case is hereby TRANSFERRED to the UNITED STATES DISTRICT COURT for the EASTERN DISTRICT OF PENNSYLVANIA.

SO ORDERED.

Royce C. Lamberth
United States District Judge

DATE: July 20, 1993

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5244 **September Term, 1993**
90cv02677

Filed Oct. 13, 1993

Ron Garvin, Clerk
United States Court of Appeals
For the District of Columbia Circuit

In re:

Jacquelyne L. Neal,

Petitioner

BEFORE: Wald, Williams and Henderson, Circuit Judges

ORDER

Upon consideration of the petition for a writ of mandamus, it is

ORDERED that the petition for a writ of mandamus be denied. Mandamus is an extraordinary remedy, and will be granted to prohibit transfer "only if the court concludes, upon review of the entire record, that the district court grossly abused its discretion." In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988). The district court in this case did not abuse its discretion in concluding that transfer would serve the interest of justice. See 28 U.S.C. § 1404(a).

Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Filed Dec. 3, 1993

JACQUELYNE L. NEAL	)	CIVIL ACTION
	)	
v.	)	
	)	
SCHNADER, HARRISON, SEGAL & LEWIS, et al.	)	No. 93-5611

MEMORANDUM AND ORDER

FULLAM, Sr. J. DECEMBER 2, 1993

In what is essentially an attorney-client fee dispute, this pro se plaintiff filed an action in the Superior Court of the District of Columbia against the law firm of Schnader, Harrison, Segal & Lewis, as well as a large number of that firm's present and former partners. Defendants removed the case to the United States District Court for the District of Columbia (plaintiff is a citizen of Tennessee; defendants are all citizens of other states). The action was subsequently transferred to this Court pursuant to 28 U.S.C. §1404(a).

Plaintiff now moves this Court to remand this action to the Superior Court of the District of Columbia; she believes that she "represents the masses of citizens throughout this nation" and "billion dollar corporations" who are consumers of legal services, and that this somehow destroys diversity and divests the federal courts of subject matter jurisdiction. Plaintiff is mistaken in her view of the law. If this case were to be transferred at all, it would be to the United States District Court for the District of Columbia, and not the Superior Court. In any event, the doctrine of law of the case precludes such a transfer; moreover, it was reasonable for the District Court to find that this was the more convenient forum. An Order follows:

Entered: 12/6/93
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JACQUELYNE L. NEAL	)	CIVIL ACTION
	)	
v.	)	
	)	
SCHNADER, HARRISON, SEGAL & LEWIS, et al.	)	No. 93-5611

ORDER

AND NOW, this 2nd day of December, 1993, it is ORDERED that Plaintiff's motion for remand is DENIED.

/s/ John P. Fullam

Sr. J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JACQUELYNE L. NEAL	)	CIVIL ACTION
	)	
v.	)	
	)	
SCHNADER, HARRISON, SEGAL & LEWIS, et al.	)	No. 93-5611

MEMORANDUM AND ORDER

FULLAM, Sr. J. MARCH 22, 1994

The pro se plaintiff in this action retained Schnader, Harrison, Segal & Lewis to represent her in a Title VII action against the EEOC, her former employer. The matter was assigned to Louis Moffa, then an associate in the firm's Washington, D.C. office. The retainer agreement provided that Ms. Neal would keep a deposit of $5,000 with the firm and pay monthly bills for services rendered. Plaintiff ultimately prevailed, winning reinstatement, back pay and attorneys' fees. The total award was $56,134.95. The firm kept all but $13,401 of that amount. Ms. Neal claims that she paid out-of-pocket $30,285.75 in legal fees, so that the firm still owes her $16,884.27.[1] Plaintiff also claims that the firm did not include in its petition for attorneys' fees more than $6,500 that she was charged, and that she was billed for work that was not actually performed.

Plaintiff made valiant attempts to get from the firm what she thinks is due her, including demonstrating for several weeks in front of Schnader's Philadelphia and Washington offices.

Plaintiff filed her complaint in the District of Columbia Superior Court on October 5, 1990. Defendants removed the action to the

[1] I note that these figures do not add up.

Entered: 3/24/94
Clerk of Court

U.S. District Court for the District of Columbia. Judge Lamberth, in an opinion filed on November 20, 1991, dismissed plaintiff's breach of contract claim as time-barred, and dismissed Ms. Neal's claims against Bernard Segal and for intentional infliction of emotional distress for failure to state a claim. On defendants' motion, Judge Lamberth transferred this action to this court on July 20, 1993, pursuant to 28 U.S.C. §1404(a).

Defendants, having since taken plaintiff's deposition, have moved for summary judgment on plaintiff's two remaining claims and contend: (1) that her fraud claim is time-barred; (2) that her deceit claim against Louis Moffa is time-barred; and (3) that she cannot establish an essential element of her deceit claim (i.e., that defendants' statements of intention were false when uttered).

Defendants argue persuasively in support of their position, with liberal citation to plaintiff's deposition testimony. I might even have agreed with them, had they but provided this court with a copy of that testimony. They did not, and the remaining evidence, which primarily consists of duelling affidavits, is not an appropriate basis for a grant of summary judgment. An Order follows:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JACQUELYNE L. NEAL	)	CIVIL ACTION
	)	
v.	)	
	)	
SCHNADER, HARRISON, SEGAL & LEWIS, et al.	)	No. 93-5611

ORDER

AND NOW, this 22nd day of March, 1994, it is ORDERED that Defendants' Motion for Summary Judgment is DENIED.

/s/ John P. Fullam

Sr. J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED JUN 14, 1994

JACQUELINE L. NEAL	)	CIVIL ACTION
	)	
v.	)	
	)	
SCHNADER, HARRISON, SEGAL & LEWIS, et al.	)	No. 93-5611

ORDER

AND NOW, this 14th day of June, 1994, it is ORDERED:

1. Plaintiff's Motion for Reconsideration, Motion for Clarification and Motion for "Expedited Notification" are DENIED.

2. If Plaintiff wishes to appeal a ruling of this Court, she may do so in the manner prescribed by the Federal Rules of Appellate Procedure.

/s/ John P. Fullam

Sr. J.

Entered: 6/15/94
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1645

JACQUELYNE L. NEAL,

Appellant

v.

SCHNADER, HARRISON, SEGAL & LEWIS; WILLIAM H. BROWN, III; BERNARD G. SEGAL; ARTHUR H. KAHN; EDWARD MULLINIX; LOUIS R. MOFFA, JR.; FRANK H. ABBOTT; MILTON D. ANDREWS; MASON AVRIGIAN; LAURANCE E. BACCINI*; WILLIAM M. BARNES; DAVID G. BATTIS; EDWARD L. BAXTER; RICHARD D. BIRNS; STEPHEN D. BROWN; CHARLES R. BRUTON; M. CHRISTINE CARTY; S. JAY COOKE; J. GORDON COONEY; JAMES D. CRAWFORD; JOSEPH C. CRAWFORD; JOHN J. CUNNINGHAM, III; PAUL G. DEMBLING; DIANA S. DONALDSON; J. ALLEN DOUGHERTY; JAMES A. DROBILE; ISAAC E. DRUKER; JOSEPH B. ERWIN; PETER FEUERLE; ALMA S. FLESCH; W. MICHAEL GARNER; ALLAN D. GOODRIDGE; CARL J. GREEN; STEPHEN J. GREENBERG; THOMAS A. GREENE; VINCENT P. HALEY; JACOB P. HART; BANCROFT D. HAVILAND; RONALD E. HAYDANEK; CHARLES C. HILEMAN, III; CHARLES M. HONART; DAVID S. HOPE; JEFFREY R. HOROWITZ; JOHN H. HOUGH; JOHN D. ISKRANT; M. RICHARD KALTER; STEVEN R. KANES; JOHN T. KEHNER; ROBERT L. KENDALL, JR.; ALAN H. KENT; DAVID E. KENTY; BRENDA C. KINNEY; WILBUR L. KIPNES; PHILIP G. KIRCHER; MARILYN Z. KULTER; JOHN P. LAMPI;

* (Amended as per the Clerk's 7/29/94 Order)

LARRY P. LAUBACH; JOHN H. LEDDY; NICHOLAS J. LEPORE, III; SAUL LEVIT; JOSEPH LEVY; ALAN M. LIEBERMAN; MICHAEL J. MANGAN; JOHN E. McKEEVER; THOMAS J. McLEAN; HERBERT S. MEDNICK; ALBERT MOMJIAN; BARRY S. NEUMAN; GEORGE H. NOFER; ROBERT P. OBERLY; THOMAS EARL PATTON; RICHARD A. PENNA; DAVID S. PETKUN; NICHOLAS N. PRICE; YVES P. QUINTIN; GEORGE E. RAHN, JR.; DONALD H. RIVKIN; SANFORD M. ROSENBLOOM; BRUCE A. ROSENFIELD; FRANK C. SABATINO; THOMAS R. SCHMUHL; DEENA JO SCHNEIDER; LAURENCE SCHOR; JEFFREY L. SCHULTE; DONALD M. SCHWENTKER; IRVING R. SEGAL; JEROME J. SHESTACK; BARRY SIMON; DAVID SMITH; DELBERT D. SMITH; BERNARD J. SMOLENS; RALPH S. SNYDER; CARL. A. SOLANO; BARRY R. SPIEGEL; GERARD J. ST. JOHN; CLINTON A. STUNTEBECK; DENNIS R. SUPLEE; SHERRY A. SWIRSKY; JOSEPH A. TATE; IRA P. TIGER; MARTIN WALD; RALPH G. WELLINGTON; MARGARET S. WOODRUFF; JOHN M. WYSER-PRATTE, ALL DEFENDANTS

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO,
ROTH, LEWIS, McKEE and SAROKIN,
Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

Jan. 4, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED MAY 18, 1994

JACQUELYNE L. NEAL	)	CIVIL ACTION
	)	
v.	)	
	)	
SCHNADER, HARRISON, SEGAL & LEWIS, et al.	)	No. 93-5611

MEMORANDUM AND ORDER

FULLAM, Sr. J. MAY 17, 1994

By Memorandum and Order dated March 22, 1994, I denied defendants' summary judgment motion because of their failure to provide the court with plaintiff's deposition testimony. Defendants have now filed a copy of the testimony in question, and ask that I reconsider my earlier decision.

The pro se plaintiff in this action retained Schnader, Harrison, Segal & Lewis to represent her in a Title VII action against the EEOC, her former employer. Plaintiff prevailed, winning resinstatement, back pay and attorneys' fees, but claims that the firm still owes her almost $17,000 in legal fees which she had paid out-of-pocket. Ms. Neal also claims that the firm did not include in its fee petition several thousand dollars for which she was charged, and that she was billed for work that was not actually performed.

Defendants argue: (1) that plaintiff's fraud claim is time-barred; (2) that her deceit claim against former Schnader associate Louis Moffa is time-barred; and (3) that she cannot establish an essential element of her deceit claim (i.e. that defendants' statements of intention were false when uttered). The parties apparently agree that application of Washington, D.C.'s three-year statute of limitations on fraud and deceit actions is appropriate here, but differ as to which jurisdiction's substantive law of deceit should apply.

Entered: 5/19/94
Clerk of Court

1. The fraud claim

Plaintiff contends that defendants' fraud was concealed from her until March 1988. She filed her complaint on October 5, 1990. Under District of Columbia law, "a defendant is estopped from asserting the statute of limitations as a bar to plaintiff's action if he has done anything that would tend to lull the plaintiff into inaction and thereby permit the statutory limitation to run against him." Property 10-F, Inc. v. Pack & Process, Inc., 265 A.2d 290, 291 (D.C. App. 1970). However, "[i]f ample time to file suit within the statutory period exists after the circumstances inducing delay have ceased, there is no estoppel against pleading the bar of the statute." Id.

It is clear that plaintiff knew of the billing discrepancies as of July 20, 1987, when she met with Mr. Moffa to discuss the matter. Assuming that defendants lulled plaintiff into inaction by assuring her that they would deal with her claim in good faith, by her own admission this "lulling" ended in March 1988, when plaintiff was told that no additional money would be forthcoming. She still had over two years — until July 20, 1990 — within which to file this action. Plaintiff's fraud claim is therefore time-barred.

2. The deceit claim against Moffa

It is plain that plaintiff had no contact whatsoever with Mr. Moffa after July 20, 1987, although she claims that her "communications" with him were "by and through" Schnader partners Arthur Kahn and William Brown. Apparently, plaintiff was told by Messrs. Kahn and Brown that they had discussed her complaint with Moffa.

Defendants argue that since plaintiff's last contact with Moffa was more than three years before the complaint was filed, the deceit claim against him is also time-barred, and that the "indirect" communication plaintiff is talking about cannot support such a cause of action. I agree. Furthermore, I conclude for the reasons that follow that plaintiff cannot establish that any of the defendants' statements of intention were false when uttered.

3. The deceit claims

I am inclined to believe that the substantive law of Pennsylvania applies here, but the law of the District of Columbia is substantially the same. The elements of a deceit action in Pennsylvania are:

(1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention that another person will thereby be induced to act or refrain from acting; (4) justifiable reliance by the recipient; and (5) damage to the recipient. See United States Gypsum Co. v. Schiavo Bros., Inc., 450 F. Supp. 1291, 1312 (E.D. Pa. 1978) (citing Savitz v. Weinstein, 395 Pa. 173, 149 A.2d 110 & (1959)). In the District of Columbia, the elements of fraud or deceit are: (1) a false representation; (2) concerning a material fact; (3) made with knowledge of its falsity; (4) with intent to deceive; and (5) upon which plaintiff acts in reliance. See Kropinski v. World Plan Executive Council, 853 F.2d 948, 953 (D.C. Cir. 1988). Each element must be proved by clear and convincing evidence. See Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Investments, 951 F.2d 1399, 1409 (3d Cir. 1991); Bennett v. Kiggins, 377 A.2d 57, 59 (D.C. App. 1977), cert. denied, 434 U.S. 1034 (1978).

In neither jurisdiction may a promise or statement of intention be the basis for a deceit action unless the statement is false when made. See Brentwater Hones, Inc. v. Weibley; 471 Pa. 17, 23, 369 A.2d 1172, 1175 (1977); Urban Investments, Inc. v. Branham, 464 A.2d 93, 98 (D.C. App. 1983). Simple nonperformance is not enough to establish that a promise or statement of intention was false when made. See Mellon Bank Corp., 951 F.2d at 1410 (citing Fidurski v. Hammill, 328 Pa. 1, 2, 195 A. 3, 4 (1937)); Urban Invs., 464 A.2d at 98-99. And in Pennsylvania, at least (although presumably the courts of the District of Columbia would agree), fraudulent intent may not be inferred from subsequent events. See Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Invs., 750 F. Supp. 711, 717 (W.D. Pa. 1990), aff'd, 951 F.2d 1399 (3d Cir. 1991); T.I. Constr. Co. v. Kiewit Eastern Co., C.A. No. 91-2638, 1992 U.S. Dist. LEXIS 19213, at *13-14 (E.D. Pa., Dec. 9, 1992).

In plaintiff's amended complaint, she alleges that defendants deceived her (1) by lending her to believe that they would make a good faith effort to recover attorney's fees in her case; (2) by leading her to believe that they would make a good faith effort to respond to and resolve her 47-page letter of complaint; and (3) by leading her to believe that they would expeditiously reevaluate the merits of her complaint. In her affidavit, plaintiff simply reasserts her belief that

defendants' subsequent actions "concealed the fraud" from her. In her response to the motion for summary judgment, plaintiff cites the following as evidence of defendants' fraudulent intent:

1. The fact that defendants did not issue detailed bills or explanations of their charges, and bills were delayed;
2. The fact that defendants padded their bills and withheld charges from the motion for attorney's fees, for which charges plaintiff was later billed;
3. The fact that defendant Kahn's refused to address plaintiff's initial complaints in an open meeting with other members of the firm; instead he asked plaintiff to put her complaint in writing and then did not review her complaint letter personally, but referred the matter to Mr. Brown, the partner in charge of the case;
4. References to unspecified letters from and discussions with defendants Kahn, Brown, Moffa and Edward Mullinix;
5. The fact that defendants "repeated[ly] delay[ed] dealing with plaintiff's complaint.

After careful review of the record, I must conclude that each item of evidence — with the possible exception of number 3 above, which in any event is not enough to raise a genuine issue since the actions are as consistent with honesty as with dishonesty — relates only to subsequent events and or goes to defendants' eventual nonperformance.

It is unfortunate that a case such as this, involving allegations of fraud by a former client against a prominent and highly regarded group of attorneys, should be disposed of on technical grounds, but defendants are entitled to summary judgment. An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JACQUELYNE L. NEAL	)	CIVIL ACTION
	)	
v.	)	
	)	
SCHNADER, HARRISON, SEGAL & LEWIS, et al.	)	No. 93-5611

ORDER

AND NOW, this 17th day of May, 1994, it is ORDERED:

1. Defendants' motion for reconsideration is GRANTED.

2. Judgment is entered in favor of all defendants.

/s/ John P. Fullam

Sr. J.

STATUTES AND RULES INVOLVED

28 U.S.C. §144 Bias or Prejudice of Judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. (As amended May 24, 1949, c. 139, § 65, 63 Stat. 99.)

28 U.S.C. §1291 Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. §1292(a) (1) Interlocutory Decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify

injunctions, except where a direct review may be had in the Supreme Court.

28 U.S.C. §1404 Change of Venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. §1441(b) Actions Removable Generally

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. §1447(c) and (e) Procedure After Removal Generally

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

28 U.S.C. §1651(a) Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

§41-108(a) D.C. Code Uniform Partnership Act

Role of Partners in Partnership Business; Acts Requiring Authorization for Binding; Acts Requiring Authorization by All Partners

(a) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

Rule 8(a), F.R.C.P. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Rule 12(a)(1)(A) and (b), F.R.C.P. Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings

(a)(1) When Presented. Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer (A) within 20 days after being served with the summons and complaint.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of

service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 13(a), F.R.C.P. Counterclaim and Cross-Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Rule 15(a), F.R.C.P. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and

leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 56(c), F.R.C.P. Summary Judgment

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

THIRD CIRCUIT LOCAL APPELLATE RULE

Local Appellate Rule 11.2

Retention of the Record in the District Court

A certified copy of the docket entries in the district court shall be transmitted to the Clerk of this Court in lieu of the entire record in all counseled appeals. In all pro se cases, the entire record, including briefs filed in support of dispositive motions, shall be certified and transmitted to the Clerk of this Court. The Clerk of the district court shall transmit the entire district court record in any state habeas case or habeas case emanating from any territorial courts, whether counselled or pro se. In such cases, the Clerk of the district court shall transmit to the court of appeals any state or territorial records lodged with the district court during its determination of the habeas case.